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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854
and UNITED MINE WORKERS OF AMERICA,
Petitioners,
vs.
NATIONAL LABOR RELATIONS BOARD,
and
AMAX COAL COMPANY,
A DIVISION OF AMAX, INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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Petitioners, United Mine Workers of America, Local No. 1854 and United Mine Workers of America, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 1, 1980, in which judgment was entered on April 3, 1980, and Petition for Rehearing and Suggestion for Rehearing en banc was denied on May 29, 1980, granting in part a Petition for Review by Amax Coal Company (Amax), denying a Petition for Review by United Mine Workers of America (the Union) and granting enforcement as modified to an Order of the National Labor Relations Board.

QUESTIONS PRESENTED

1. a. Are the trustees of multi-employer pension and welfare trusts created under Section 302(c)(5) of the Labor-Management Relations Act of June 23, 1947, C. 120, Title III, § 302, 61 Stat. 157, 29 U.S.C. § 186 (so-called "Taft-Hartley" Fund Trustees) representatives for the purposes of collective bargaining and adjustment of grievances, so as to make it a violation of Section 8(b)(1)(B) of that Act for a union to bargain to impasse to require a non-appointing employer to participate in such a trust?

b. Is participation in a multi-employer benefit trust a mandatory subject of bargaining between a union and an employer who is not a member of the multi-employer association which appointed the trustee for the employers?

2. Are proposed labor contract clauses which would require an employer to recognize the union and deal with it as collective bargaining agent for

workers at locations to which its operations might be extended during the term of the contract, after the union first would demonstrate its representative status at such locations, nonmandatory subjects of bargaining, such as to make it an unfair labor practice in violation of § 8(b)(3) of the Labor-Management Relations Act, 29 U.S.C. § 158(b)(3) for the union to insist on such clauses to impasse?

3. Is a proposed labor contract clause which would restrict an employer from licensing or leasing out a portion of its coal mining operations without requiring the licensee or lessee to adhere to the contract, a "hot cargo" clause violative of § 8(e) of the Labor-Management Relations Act, 29 U.S.C. § 158(e), where the Court, in reversing the National Labor Relations Board as to that clause, nevertheless upheld the Board and its determination that the Company had failed to prove its claim that its normal course of business included the licensing or leasing out of coal lands?

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OPINIONS BELOW

The opinion of the National Labor Relations Board (Appendix B, pp. 189a-222a; Appendix A, pp. 1a-188a) is reported at 238 NLRB No. 214. The opinion of the Court of Appeals for the Third Circuit (Appendix C, pp. 223a-257a) is reported at 614 F.2d 872.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1980 (Appendix D, pp. 258a-266a). Petition for Rehearing and Suggestion for Rehearing en banc, timely filed, was denied on May 29, 1980 (Appendix F, pp. 268a-269a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case directly involves Sections 8 and 302 of the Labor-Management Relations Act of June 23, 1947, 29 U.S.C. §§ 158 and 186, and indirectly involves the provisions of Subchapter I, Subtitle B, Part 4 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101-1114. They are printed in Appendices H and I, *infra,* pp. 272a-320a.

STATEMENT OF THE CASE

1. Procedural History

This case arose from unfair labor practice charges filed by Amax Coal Company, a Division of Amax, Inc., herein called Amax, in January of 1975. An Amended Consolidated Complaint was issued on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of Region 27 of the Board, alleging that the United Mine Workers of America, Local 1854, and the United Mine Workers of America, herein together called the Union or the UMWA, engaged in unfair labor practices within the meaning of Sections 8(b)(1)(B), 8(b)(3) and 8(b)(4)(i), ii(A) of the National Labor Relations Act, as amended, 29 U.S.C.A. 158 *et seq.*

On March 22, 1977, Administrative Law Judge Jerrold H. Shapiro issued his decision after hearing. Thereafter, Amax and the Union filed exceptions, the General Counsel of the Board filed cross-exceptions, and the Board reviewed the decision. The Board's decision and final Order, issued September 29, 1978, was brought before the United States Court of Appeals for the Third

Circuit on Petitions for Review filed by both Amax and the Union pursuant to Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C.A. 151 *et seq.* The Board filed a cross-application with the Court for enforcement of its Order. Amax intervened in the Union's application and the Union intervened in the application initiated by Amax. The cases were consolidated for purposes of the appeal.

The case was argued on October 18, 1979 before a panel of judges consisting of Circuit Judge Gibbons and Circuit Judge Higginbotham and District Judge Ziegler of the United States District Court for the Western District of Pennsylvania, sitting by designation. Judge Gibbons heard oral argument but did not participate in the decision of the Court.

The Opinion of Judge Higginbotham was filed February 1, 1980. The Judgment of the Court of Appeals was entered on April 3, 1980. Amax, the Union and the Board each filed Petitions for Rehearing and Suggestions for Rehearing In Banc, all of which were denied on May 29, 1980. This Petition for a Writ of Certiorari followed.

2. Factual Background

The International Union, United Mine Workers of America, is an industrial union that represents coal miners for the purpose of collective bargaining in coal mines throughout the coal regions of the United States and Canada. In 1974-75, the Union negotiated successor agreements to a number of pattern multi-employer contracts. The largest of these, the National Bituminous Coal Wage Agreement of 1974 (hereinafter the "1974 Agreement" or the "National Agreement") covered

bituminous coal mines and facilities throughout the eastern half of the United States and Canada. It was executed on December 6, 1974 and served as the model for the other agreements.

In 1975 a new multi employer labor agreement covering the western subbituminous and lignite mines was negotiated by the Union. This agreement was named the Western Surface Coal Mine Wage Agreement 1975 (hereinafter the "1975 Agreement" or the "Western Agreement"). Prior to 1975, western operators had executed the National Agreement and then arranged for a lower per-ton contribution to the UMWA Health & Retirement Fund, the predecessor to the four Health and Retirement Funds established in the 1974-75 negotiations. However, the energy crisis and resultant Project Independence had led to an increase in the capital committed to the western coal fields and their increased importance for both the operators and the Union.

During the time material to this litigation, Amax was the second largest producer of coal in the west and the third largest producer in the nation. As such it had many bituminous mines in Illinois, Indiana and Kentucky. As a major producer, Amax was intimately involved in the negotiations leading to the 1974 Agreement. Its Corporate Vice President for Administrative and Employee Relations, Roger C. Sonnemann, served on the council that set the priorities and directions for the negotiators designated by the Bituminous Coal Operators Association (BCOA), the multi employer association with whom the Union negotiated the 1974 Agreement. Amax Senior Vice President for Administrative and Employee Relations, H. Elkins Payne, was chairman of the BCOA subcommittee for surface mines. Thus

Amax was deeply involved in the negotiation of the 1974 Agreement.

This case arose out of negotiations for a labor agreement between the Union and Amax at its Belle Ayr Mine in Campbell County, Wyoming. Amax began construction of the Belle Ayr Mine, its only subbituminous mine, in early 1971 and first shipped coal from the mine in October, 1973. In 1973, the UMWA was certified as the collective bargaining representative of the Belle Ayr employees following an NLRB election. Thereafter Amax executed the 1971 National Agreement, as amended by the Western Royalty. The 1971 Agreement expired in November, 1974. Negotiations for a successor agreement were delayed by the on-going negotiations with BCOA for the 1974 National Agreement as well as by a dispute as to whether Amax had joined in a multi-employer group which eventually negotiated the 1975 Western Agreement. Following a number of contract extensions, direct negotiations between Amax and the Union over the Belle Ayr Mine began in January, 1975, and continued through November, 1975.

3. Factual Background of Contract Clauses in Dispute

Included in the contract proposals submitted by the Union were three separate clauses known as the "Trustee Clause," the "coal lands and enabling clause," and the "leasing-licensing out clause." The factual background for each clause is set forth in that order below. This petition seeks review of the decision of the United States Court of Appeals for the Third Circuit as it relates to each clause.

a. The first proposal was that Amax participate on behalf of its Belle Ayr employees in the UMWA Health

& Retirement Funds (Funds) established by the 1974 National Agreement, just as it had following execution of the 1971 Agreement covering the Belle Ayr Mine in 1973.

The Funds provided comprehensive health and retirement benefits to coal miners and their families and were established by irrevocable trusts in conformity with Section 302(c) of the Labor Management Relations Act of 1947, as amended (LMRA). Such trusts are directed by three trustees, one appointed by the employers, another appointed by the union, and a neutral trustee selected by the two trustees. The trustees' status is defined as that of fiduciaries within the meaning of the Employee Retirement Income Security Act of 1974. They are appointed for at least the duration of the collective-bargaining agreement and may be removed by the party that appointed them only for "cause." They are paid out of the Funds' assets.

The trustees' authority is restricted by the terms of the trust documents to limited administrative responsibilities, primarily involving the preservation of the financial integrity of the trusts.

Since the Funds were established under the 1974 and prior Agreements negotiated with BCOA, the employer-appointed trustees had already been named by BCOA through internal procedures participated in by Amax. The Union's proposal that Amax participate in the Funds for its Belle Ayr Mine in the same manner that it had done under its Agreement in 1973 and was participating for its midwestern mines under the 1971 BCOA contract, necessarily included the same trustees. Amax objected to the UMWA's health and retirement proposal on several grounds, one of which was that it

had no voice in the selection of the employer trustee, although it had previously contracted to contribute to those Funds. The Union insisted to impasse that Amax agree to a collective bargaining agreement which included this proposal, and carried forward the previous arrangement. The complaint alleges that the Union violated Section 8(b)(1)(B) and 8(b)(3) of the Act in that it "adamantly insisted on the inclusion of Pension and Health and Welfare Trust Provisions, by the terms of which the trustees . . . would not be selected by the employer."

There are few matters which the Union more properly considered as a mandatory subject of collective bargaining than the proposal that Amax contribute moneys into a program to furnish Amax's employees with health and retirement benefits. Insofar as this proposal established a procedure to administer the program which significantly affects the employees' terms and conditions of employment, it was also considered a mandatory subject of bargaining. The administration of the program, however, includes the designation of an employer-appointed trustee, who had been selected prior to Amax's negotiations for its Belle Ayr Mine. The question for decision was whether the Funds' trustees, who are appointed by the UMWA and the Employers to administer the health and retirement program, are "representatives for the purpose of collective bargaining" within the meaning of Section 8(b)(1)(B) of the Act.

The Administrative Law Judge held the trustees were not representatives within the meaning of the Act and dismissed the portion of the Complaint alleging the Section 8(b)(1)(B) and 8(b)(3) violations. The Board affirmed this finding but the Circuit Court of Appeals reversed.

b. The second aspect of the decision of the Court of Appeals for which this Petition seeks review relates to the Union's contract proposals referred to as the "coal lands clause" and the "enabling clause."

These clauses provided in pertinent part as follows:

> Article I: Enabling Clause
>
> This agreement . . . covers the sub-bituminous coal or lignite mines owned or operated by [Amax].
>
> Article II
>
> (f) . . . this agreement covers the operation of all the coal lands, coal producing, and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the terms of this agreement) be put into production or use.

Although the Union in answer to objections posed by Amax almost immediately indicated that these clauses would not be effective unless and until the Union was recognized or certified as the bargaining representative of employees at any such new operations and indicated a willingness to reduce this to writing in a separate memorandum, the Union in July, 1975, added a proviso to the above-described "Enabling Clause" which required that the UMWA must be "the bargaining representative of the employees of the Employer at such mines," and added a similar proviso to the above-described "coal lands clause" which required that the "Union establish its status as the representative of a majority of the employees at such mine or facility." The next and final change in these proposals was made by the UMWA on November 1, 1975, when it deleted the "coal lands clause"

in its entirety from its contract proposal and changed the "Enabling Clause" to read as follows:

> This agreement covers [Amax's] Belle Ayr Mine and all other western sub-bituminous and lignite mines, coal lands, coal producing and coal preparation facilities, owned or operated or held under lease by it, or by any subsidiary or affiliate at the date of this agreement, or which may hereinafter (during the terms of this agreement) be put into production or use on the leases attached hereto as Addendum A.

A letter accompanying this proposal explained that

> . . . the UMWA has agreed to the concept that the proposed Agreement should pertain to the Belle Ayr Mine only. However, the Union feels very strongly that the Belle Ayr Mine comprises any mining which will be done on the present leases held by Amax in Campbell County, Wyoming [the site of the Belle Ayr Mine]. Therefore, the language of Article I has been restructured to insure that although the agreement will apply only to the Belle Ayr Mine, the UMWA will obtain jurisdiction of all new operations on those leases.

The Administrative Law Judge found that by insisting on the coal lands and Enabling clauses, the Union violated Section 8(b)(3) LMRA on the grounds that these clauses were permissible but non-mandatory subjects of collective bargaining on the theory that although the subject clauses protected the economic standards of the Belle Ayr miners, they required Amax to bargain over wages and other terms and conditions of employment of employees in bargaining units other than the Belle Ayr Mine.

The Board disagreed and dismissed that section of the Complaint. The Board concluded that the clauses merely sought to preserve the employment opportunities of the employees in the existing unit by ensuring that the employees of any other operation put into production by Amax during the terms of the contract, for whom the Union had obtained bargaining rights, would receive the same wages and benefits as the employees of the Belle Ayr Mine. Moreover, it concluded that the Administrative Law Judge erred in his analysis of the clauses. Whereas the Administrative Law Judge interpreted the clauses as including the non Belle Ayr operations in the Belle Ayr bargaining unit, the Board concluded that the other operations remained separate bargaining units but became subject to the same contract provisions.

The Circuit Court of Appeals disagreed with the Board, holding that the clauses were not within the area of "wages, hours and other terms and conditions of employment" and concluded that the scope of the bargaining unit was not a mandatory subject, making the Union's insistence to impasse an unfair labor practice.

c. The third aspect of the decision of the Court of Appeals for which this Petition seeks review relates to the Union's "Leasing, Subleasing and Licensing Out of Coal Lands" contract proposal submitted on January 6, 1975. This clause reads as follows:

> The employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this agreement or any section, paragraph or clause thereof.

> Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the work is performed by members of the United Mine Workers of America in the manner and to the extent permitted by law and that the licensing out does not cause or result in the layoff of employees of the Employer; provided, however, that either the licensor or licensee, lessee or sublessee makes the appropriate payments provided by this Agreement to the United Mine Workers of America Health and Retirement Fund and otherwise abide by the terms of the Agreement.

Although Amax initially objected to the "leasing-licensing out clause," it incorporated the clause into its contract proposal in January and February, 1975. Subsequently, it deleted the clause from its contract proposal offered March 14, 1975. The UMWA proposal of July, 1975, deleted the second paragraph of the clause in its entirety. The UMWA continued to propose the first paragraph for the remainder of the negotiations.

The Administrative Law Judge held that the second paragraph of the "leasing-licensing out" clause violated Section 8(e) of the LMRA, that the Union, by engaging in a strike to require Amax to accept a collective bargaining agreement including the clause violated Sections 8(b)(4)(A) and 8(b)(3) and that by insisting to impasse that Amax agree to a contract containing the provision the Union violated Section 8(b)(3) of the Act. The Board adopted the recommendation of the Administrative Law Judge in this regard and the Court of Appeals granted enforcement.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Wrongly Decided an Important Question of Federal Labor Law under the LMRA and ERISA Which This Court Should Settle, Relative to the Status of Trustees of Employee Benefit Trusts and Representatives of Unions and Employers in Collective Bargaining Relationships.

A two-judge panel of the Court of Appeals for the Third Circuit consisting of A. Leon Higginbotham, Circuit Judge, and Donald E. Ziegler, District Judge, sitting by designation, overturned a closely reasoned determination of the National Labor Relations Board's Administrative Law Judge (Appendix A), which the Board adopted (Appendix B), that the Union did not violate Section 8(b)(1)(B) and 8(b)(3) of the LMRA by insisting to impasse and striking to obtain Amax's participation in the UMWA 1974 Benefit Plan and Trust.

The two-judge panel held in part that the trustee of a valid Taft-Hartley trust is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the LMRA. It did so solely on the basis of its extrapolation from *dictum* in its decision in *Associated Contractors of Essex County, Inc. v. Laborers International Union of North America,* 559 F.2d 222 (3rd. Cir., 1977), which contradicted earlier holdings of that same Court in *United Marine Division, I.L.A. v. Essex Transportation Co.,* 216 F.2d 410 (3rd Cir., 1954) and *Mechanical Contractors Association of Philadelphia, Inc. v. Local Union 420,* 265 F.2d 607 (3rd Cir., 1959).

The decision, if permitted to stand, has serious ramifications for the administration of multi-employer benefit trusts and in the conduct of labor relations, as

well as the administration of two important federal statutes, the Labor-Management Relations Act of 1947, or LMRA, by the National Labor Relations Board, and the Employee Retirement Income Security Act of 1974, or ERISA, by the Secretary of Labor.

1. PRE-ERISA DECISIONS

Decisions of the Courts of Appeals of the District of Columbia Circuit (*Lamb v. Carey,* 498 F.2d 789 (D.C. Cir., 1974) and the Ninth Circuit (*Toensing v. Brown,* 528 F.2d 69 (9th Cir., 1975) have reached contrary conclusions on the status of trustees of multi-employer benefit trusts. The National Labor Relations Board's Decision in the case of *Sheet Metal Workers International Association,* 234 NLRB 1238 (1978) pet. for review pending (5th Cir., No. 79-2396), on which it relied in its decision adopting the decision of Administrative Law Judge Shapiro in this case, treats the question of the status of fund trustees in detail.

Employee benefit trust funds which meet the requirements of Section 302(c)(5) of the LMRA, so-called Taft-Hartley trusts, are administered by employer-appointed and union-appointed trustees and either a neutral trustee or provision for a neutral to break deadlocks between the trustees when such occur. Although the word "representative" is used in Section 302(c)(5) to designate the persons who act as trustees in such trusts, the consistent judicial interpretation, until the instant case was decided by the Court of Appeals for the Third Circuit, has been that such persons bear fiduciary responsibilities as trustees which isolate them from the politics of labor-management contention.

In *Blankenship v. Boyle,* 329 F. Supp. 1089 (D.D.C. 1971), a case which involved an earlier UMWA fund, the argument for representative rather than trustee status for the respective union and employer trustees was advanced and rejected. The Court held that the trustees owed undivided loyalty to the beneficiaries, to the exclusion of any benefit to the appointing parties. In a subsequent effort by the union to remove a new trustee on the ground that he would not implement the wishes of the members of the union, the Court refused, holding that the trustee's duty was to the beneficiaries and not to the union: *Lamb v. Carey,* 498 F.2d 789, 794 (D.C. Cir. 1974).

In *Toensing v. Brown,* 528 F.2d 69 (9th Cir., 1975), the Court of Appeals for the Ninth Circuit held that the trustees of a Taft-Hartley trust must discharge their fiduciary duty in the exercise of independent judgment in the administration of the trust; recommendations of collective bargaining parties are not binding or obligatory. *Id.* at p. 72.

The Court of Appeals for the Third Circuit in two of its own decisions, *United Marine Division, I.L.A. v. Essex Transportation Co., supra,* and *Mechanical Contractors Association of Philadelphia, Inc. v. Plumbers Union, supra,* in 1954 and 1959 declared the paramount duty of Taft-Hartley trustees to their beneficiaries.

2. POST-ERISA FIDUCIARY ADMINISTRATION

Significantly, the Third Circuit Court of Appeals has recently, in another context, recognized and enforced the stringent standards which ERISA imposes in Section 406(b)(2), 29 U.S.C. §1106(b)(2), forbidding a fiduciary with respect to a plan from acting in any transaction involving the plan on behalf of a party or representing a

party whose interests are adverse to the interests of its participants or beneficiaries: *Cutaiar v. Marshall,* 590 F.2d 523 (3rd Cir., 1979). The Court carefully observed the Congressional policy declared in ERISA, noted its more stringent requirements than those theretofore imposed by Section 302(c)(5) of the Taft-Hartley Act, and upheld by administrative ruling by the Secretary of Labor specifying a *per se* violation by trustees acting on behalf of less than all the participants and beneficiaries of two plans which were made parties to a loan transaction by their trustees.

It is, then, anomalous, that the same Court in the instant case has cast aside the strict fiduciary standards it recognized in *Cutaiar v. Marshall* and embraced a *dictum* in a pre-ERISA opinion to make bargaining representatives of Taft-Hartley trustees. The National Labor Relations Board in its *Sheet Metal Workers International Association* decision, *supra,* at pp. 1246-48, discussed at length the Congressional distribution of enforcement responsibility between the Board, as to unfair labor practices, and the courts, as to Taft-Hartley trusts. It rejected the interpretation of the Administrative Law Judge in that case, which would have added to the Board's unfair labor practice jurisdiction by treating Taft-Hartley trustees as collective bargaining representatives. That analysis of the Congressional policy expressed in separate statutory provisions is consistent with the analysis of national labor policy and employee benefit trust administration which the Court of Appeals for the Third Circuit set out in *Cutaiar v. Marshall, supra.*

Congress conferred authority on the Board in collective bargaining matters under Sections 10 and 8 of the

Wagner Act and the LMRA. In the Taft-Hartley Act it conferred jurisdiction on the District Courts in cases arising under Sections 301 through 303. In ERISA it empowered the Secretary of Labor to enforce minimum fiduciary standards in employee benefit trust administration.

Its clearly expressed policy as to fiduciary standards is consistent with but more explicit than earlier, pre-ERISA standards recognized by the courts in the cases noted in the preceding section of this Argument.

If trust administration is to be treated as collective bargaining by the National Labor Relations Board, as the decision in the instant case would have it, then that board must assume additional and concurrent responsibilities over an area of regulation already committed to the courts and the Secretary of Labor under Sections 301-303 of the LMRA and under Part 4 of Subtitle B of Subchapter I of ERISA. The potential conflict between concurrent jurisdictions was not intended by Congress. Labor laws are not to be interpreted by the NLRB or the courts in such a way as to "usurp major policy decisions properly made in Congress" or to move the NLRB "into a new area of regulation which Congress has not committed to it": *Ford Motor Company v. N.L.R.B.*, 441 U.S. 488 at 497 (1979).

Furthermore, if a union-appointed trustee is to be responsible for union representation, then actions under §301 of LMRA will lie in the District Courts for breach of the duty of fair representation.

While it may be conceded that a person does not, by assuming fiduciary responsibilities, cease to be capable of occupying other relationships, it is clear from the

nature of the office that a trustee may not act in it except as fiduciary duty may require. Section 406(b) of ERISA is explicit:

> A fiduciary with respect to a plan shall not . . .
>
> * * * * *
>
> (2) in its individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, . . . 29 U.S.C. §1106(b)

That language was cited and quoted in *Cutaiar v. Marshall, supra.* It is consistent with the words of the same Court in *United Marine Division, I.L.A. v. Essex Transportation Co., supra:*

> These trustees were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or em-employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out. —216 F.2d at p. 412

That language and the principle which it expresses cannot be squared with the holding of the two-judge panel of the Court of Appeals in this case, which is based upon the *dictum* of the same Court in *Associated Contractors of Essex County, Inc. v. Laborers International Union,* 559 F.2d 222, 228 (3d Cir. 1977), from which the following quotation is a part of the language relied on:

> Naturally, the trustees of such a trust fund function as fiduciaries for the fund's beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. 559 F.2d at 228

Such a view of employee benefit trust administration—as a part of the collective bargaining process—is erroneous. The functions of trustees are defined and limited by the trust instruments, whereas collective bargaining representatives must and do act in situations where the agreements between them are silent or uncertain. Judicial recognition of the nature of a labor agreement as ". . . an effort to erect a system of industrial self-government" (*United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960)) in which the representatives of workers and employers use the ongoing relationship to fill in the interstices does not make a trustee whose functions are spelled out in a trust agreement a partisan representative. A trustee may not act as a representative of a party. The limitation is clear and explicit, as the Court of Appeals found in *Cutaiar v. Marshall, supra.*

The *dictum* relied on by the two-judge panel in this case was both unnecessary and inappropriate to the decision of the case in which it appears. The issue decided in that case was the legality of amendments to an otherwise valid Taft-Hartley trust, the result of which would have been to designate two sets of employer-trustees representing rival employer associations, with the pos-

sibility that the union trustees might play them off against each other and sacrifice fiduciary duty to partisan expediency. The Court's comments regarding the trustees being representatives of the unions and employers were gratuitous, because the purported amendment was patently violative of the requirements of Section 302(c)(5) of the LMRA which mandates equal numbers of union and employer trustees.

3. The Serious Damaging Effect of the Decision on Multi-Employer Welfare and Retirement Trusts

In enacting ERISA after long and careful study, the Congress had as one of its primary goals the promotion of sound administration of jointly administered multi-employer health and pension plans. According to current Department of Labor estimates, more than 8 million employees are covered by such plans, and 1.2 million people are pensioners of those plans.

Congress stated, in Section 2(a) of ERISA, 29 U.S.C. §1001(a), among others, two perceived evils:

> ... that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits....

Those evils Congress seeks to correct, according to its declaration of policy, 29 U.S.C. §1001(c):

> ... by requiring [private pension plans] ... to meet minimum standards of funding and by requiring plan termination insurance.

The two-judge panel decision renders bargaining to secure participation in multi-employer employee benefit trusts a non-mandatory subject of bargaining, and so effectively precludes employees of single-employer units from sharing the protection, stability and cost savings offered by multi-employer funds. The United Mine Workers Funds include 2009 companies which are signatory to the 1978 BCOA contract. Of these, 1786 are independents, who will have a non-bargaining veto over their employees' efforts to join a stable multi-employer plan, if the decision is permitted to stand.

Thus many small, individual pension plans will be exposed to higher costs and the vagaries of small business failures, and existing welfare and retirement plans will be threatened by the departure of independent signatories who will have a non-bargainable license to withdraw from multi-employer plans to bargain for cheaper programs in smaller actuarial groupings, contrary to the declared policy of Congress to promote plan stability.

It is ironic that the catalogue of mandatory subjects of bargaining is thus weakened in an area of such critical importance. This Court's holding in *Ford Motor Company v. N.L.R.B.*, 441 U.S. 488 (1979), that in-plant food service is a mandatory subject of bargaining, recognized the importance of judicial deference to NLRB judgment in the field of mandatory and permissive subjects of bargaining.

In its decision in the instant case, the NLRB directed close scrutiny to the Congressional policy (85a-87a, 206a-210a). In its earlier decision in *Sheet Metal Workers International Association,* 234 NLRB 1238 (1978), Pet. for review pending (5th Cir., No. 79-2396), the NLRB noted the steady growth of multi-employer

plans under Section 302(c)(5) of the Taft-Hartley Act, and stated, 234 NLRB at p. 1245:

> In our view, the widespread acceptance of multi-employer benefit and pension trust funds, established pursuant to Section 302(c)(5), is reflective of the fact that collective bargaining over such plans, including their subsidiary aspects such as the manner in which the trustees are selected has been successful in accommodating the various interests of the parties.

It will be even more ironic—indeed, tragically so—that the NLRB's judgment as to the necessity of bargaining over the prices of food in company lunchrooms would be accepted under the rule of *Ford Motor Co. v. NLRB, supra,* but not as to health and retirement plans, under the rule of the two-judge panel of the Court of Appeals for the Third Circuit in this case. It is a decision which should be reviewed by the Supreme Court. This writ should be granted.

B. The Court of Appeals Decision Reversing the NLRB Determination That the Coal Lands and Enabling Clauses of the Contract Proposals Are Mandatory Subjects of Collective Bargaining Should Be Reviewed by the Supreme Court.

The refusal of the Court of Appeals to enforce the National Labor Relations Board's decision that the coal lands and enabling clauses are mandatory subjects of collective bargaining conflicts with the decisions of this Court in *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1959); *Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971) and *Fibreboard Corp. v. NLRB,* 379 U.S. 203 (1964).

The Court of Appeals ruled that the effect of the subject clauses was to force Amax to bargain on a basis broader than the certified unit and based its decision on this Court's decision in *NLRB v. Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, 359 (1958) to the effect that mandatory subjects of collective bargaining are those which came within the areas of "wages, hours and conditions of employment."

To be sure, Section 8(d) of the National Labor Relations Act defines the duty to bargain collectively in terms of conferring in good faith with respect to wages, hours and the other terms and conditions of employment. This Court has ruled, however, that:

> Section 8(d) of the Act . . . does not immutably fix a list of subjects for mandatory bargaining. See e.g. Fibreboard Corp. v. NLRB, supra, at 220-221 (Stewart J., concurring) Richfield Oil Corp. v. NLRB, 97 U.S. App. D.C. 383, 389, 390, 231 F.2d 717, 723, 724 (1956). But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and employees. See, e.g., NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958). Although normally matters involving individuals outside the employment relationship do not fall within that category, they are not wholly excluded.
>
> Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971)

Thus in *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1959) this Court ruled that a labor agreement's pro-

visions which mandated specified minimum truck rentals and operating rules, payable by Employer motor carriers to truck owners who drove their own vehicles in the carrier's service in place of the carrier's employees were mandatory subjects of collective bargaining. The clauses affected the independent business relations between carrier and individual truck owners as lessors and did not directly deal with wages, hours and conditions of employment of the truck owners as employees. Nevertheless, they were deemed mandatory bargaining subjects because they were:

> . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service.
>
> 358 U.S. at 294

Similarly, in *Fibreboard Corp. v. NLRB,* 379 U.S. 203 (1964) this Court, following its decision in *Oliver,* ruled that the proposed contracting out of the maintenance operations of a manufacturing plant was a mandatory subject of collective bargaining since it was a subject of vital concern to labor and management.

The Belle Ayr Mine is a surface installation. Its boundaries are defined by lines on a map. By drawing

such a line and turning over a spade of earth, Amax could create a new and different mine on acreage adjacent to the Belle Ayr Mine. Such a new mine manned with labor receiving substandard wages would pose a direct and significant threat to the jobs of the Belle Ayr miners. The subject clauses protect the job security of of the Belle Ayr miners by eliminating the incentive to develop mines with substandard contracts. As such, they are directly analogous to the "direct, frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" in *Oliver*. The clauses were of vital concern to the Belle Ayr miners. The Court of Appeals' ruling that those clauses are not mandatory in nature directly contradicts the earlier decisions of this Court.

The effect of the subject clauses was not to expand the scope of the bargaining unit. Rather, as the Board stated in its decision:

> . . . [W]e view the two disputed proposals as seeking a contractual commitment by [Amax] to apply the proposed agreement in its entirety to new mining or coal preparation operations that are concededly outside the scope of the existing unit, provided, of course, that the Union . . . becomes the bargaining representative of the employees at the new facility. Thus, unlike the Administrative Law Judge, we do not view this clause as purporting to expand the existing unit by absorbing the employees at a new operation.
>
> 238 NLRB No. 214 at p. 22

Thus, the clauses deal with a matter of vital concern to the Belle Ayr employees and do not affect the scope of the Belle Ayr unit. The effect of seeking an identical con-

tract at other units of the same employer is consistent with this Court's rulings that a union may vigorously pursue a uniform wage policy, *United Mine Workers v. Pennington,* 381 U.S. 657, 665 (1965) and decisions of the Courts of Appeal that a union may negotiate toward a posture suitable for coalition bargaining. *AFL-CIO Joint Negotiating Committee for Phelps Dodge v. NLRB,* 459 F.2d 374 (CA 3 1972). *U.S. Pipe & Foundry v. NLRB,* 298 F.2d 873 (CA 5 1962).

Finally, this Court should grant this petition because the decision of the Court of Appeals also conflicts with the well-established policy that courts should defer to the decisions of administrative agencies in their areas of expertise. The ruling of the NLRB with respect to these clauses is based on the undisputed record and a reasonable interpretation of the subject clauses grounded in NLRB precedent. Because of the Board's special duty to interpret and administer the National Labor Relations Act, its determination with respect to the resolution of competing interests and its determination of the mandatory or permissive nature of a subject of bargaining should be given special weight. A reviewing Court should not set aside such a decision by the administrative agency specializing in labor relations, even if it might have chosen another of two fairly conflicting views: *Universal Camera v. NLRB,* 340 U.S. 474 (1951).

The special deference due which a reviewing court owes to the Board's determination regarding mandatory subjects of collective bargaining, as recently reemphasized in *Ford Motor Co. v. NLRB, supra,* has been noted in the preceding section of this Petition. The Board's primary responsibility in interpreting and applying the statute to the facts of the case has been fairly and con-

scientiously discharged on this issue as on the trusteeship question. It should not have been set aside by the Court of Appeals. This issue should be reviewed by the Supreme Court.

C. The Leasing-Licensing Out Clause Of The Contract Proposals Was Improperly Held To Be A "Hot Cargo" Clause. The Court Of Appeals Decision On This Issue Should Be Reviewed.

The petition should be granted with respect to the third issue it raises because the decision of the Court of Appeals for the Third Circuit ruling the Leasing-Licensing Out clause violative of Section 8(e) of the NLRA is not in accordance with the decision of this Court in *National Woodwork Mfgrs. Ass'n. v. NLRB*, 386 U.S. 612 (1967). Section 8(e) of the NLRA declares it to be unfair labor practice:

> for any labor organizations and any employer to enter into any contract or agreement, express or implied, whereby such employer agrees to . . . cease doing business with any other person.

In *National Woodwork Mfgrs. Ass'n. v. NLRB*, 386 U.S. 612 (1967), this Court definitively interpreted Section 8(e) as embodying only a prohibition against "secondary" activity. "Primary" activity, albeit within the literal language of 8(e), was declared lawful and proper. The distinctions between "primary" and "secondary" activity were said to turn on "an inquiry into whether, under all the surrounding circumstances, the union's objective was preservation of work for . . . employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere". 386 U.S. at 644. Relevant circumstances to be considered in mak-

ing this determination include the remoteness of the threat of displacement, the history of labor relations involved and the economic personality of the industry. The "touchstone" to the inquiry identified by the Court is "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U.S. at 645.

Consistent with the Supreme Court's reiteration in *National Woodwork* that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," 386 U.S. at 619, the NLRB has ruled not violative of Section 8(e) various clauses binding successor employers to all of the provisions of their predecessor's collective bargaining agreements. In *Operating Engineers, Local 701 (Cascade Employers Assn.),* 221 NLRB 751 (1975), (hereinafter *Cascade*), a clause providing that the collective bargaining agreement in question was "binding upon . . successors, purchasers and assigns of the parties . . ." was upheld as lawful. Similarly, in *District No. 71, International Association of Machinists and Aerospace Workers (Harris Truck & Trailer Sales, Inc.),* 224 NLRB 100, 92 LRRM 1204 (1976) (hereinafter *Harris Truck*), the Board sustained a clause requiring the employer to condition the sale or lease of its business on the agreement of the purchaser or lessee to assume "all the obligations of the agreement until its expiration date, at which time a new agreement will be negotiated between the union and the new employer."

The decision of the Court of Appeals strikes down the subject clause because the Court viewed it as requiring a continuing relationship between Amax & licensee

employers. The clause speaks in terms of a license or lease of coal mining operations on coal lands controlled by a signatory operator. Such a relationship is not necessarily a continuing one in the context of labor relations as contracted with the continued payment of rents or royalties. The complete sale of a business, something held not within the provision of Section 8(e), may well involve payments to the selling entity over an extended period of time including payments comparable to rents and royalties.

The crux of the cases upholding successorship clauses as outside Section 8(e) is that "the sale or transfer of an enterprise . . . [is] not . . . a business transaction but . . . a substitution of one entity for another while the conduct of business continues without interruption." *Cascade* at 752. It is irrelevant whether the substitution is final or for term. Indeed the clause upheld in *Harris Truck* bound the signatory employer "to make the sale or *lease* conditional on the purchaser or *lessee* assuming all obligations of the agreement." *Harris Truck* at 1205 (emphasis added) and the clause sustained in *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Bader Brothers Warehouses, Inc.*, 225 NLRB 609 (1976) applied "[i]n the event an entire operation or part thereof, is sold, *leased,* transferred or taken over by sale, transfer, *lease,* assignment, receivership or bankruptcy proceeding . . ." *Bader Brothers, supra* at 610 (emphasis added).

The licensee or lessee contemplated in the clause under consideration here would continue to operate a portion of the Belle Ayr mine as a substitute for Amax. The transfer of a tract of Belle Ayr coal operations

would result in a separate enterprise which would survive as the same employing industry following a formal change of ownership. In surface mining, where a line on a map denotes the boundaries of a mine, unmined coal reserves can instantly be converted into a separate facility.

The record made before the Administrative Law Judge is devoid of any evidence that Amax ever leased, subleased or licensed out any of the coal lands or facilities at the Belle Ayr Mine in the normal course of doing business.

In the absence of such proof, the ruling of the Court of Appeals that the "leasing-licensing" clause is within the scope of Section 8(e) of the Act is at odds with the direction given by the Court in *National Woodwork* and the decisions of the National Labor Relations Board applying Section 8(e). Accordingly, Petitioner respectfully submits that this issue should be reviewed.

CONCLUSION

The three (3) questions discussed herein were wrongly decided by the Court of Appeals. They are important issues in Federal Labor and Employee Benefits Trust Law which this Court should settle.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA and AMAX COAL COMPANY, A DIVISION OF AMAX, INC.	Case Nos. 27-CB-900 27-CC-571

Daniel C. Ferguson for the General Counsel.
Daniel F. Gruender and *Francis F. Sulley*
(Shimmel, Hill, Bishop & Gruender)
for the Charging Party.
Harrison Combs, Richard M. Bank, Ellen P. Chapnick and *Edward J. Scheuneman* for the Respondents.

Decision

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this consolidated proceeding which was held on various dates in June and July 1976 was based upon unfair labor practice charges filed by Amax Coal Company, a Division of Amax, Inc., herein called Amax, and an amended consolidated complaint issued on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of the Board, Region 27, alleging that Respondents United Mine Workers of America, Local No. 1854, herein called Local 1854, and United Mine Workers of America, herein called UMWA, have engaged in unfair labor practices within the meaning of Section 8(b)(1)(B), 8(b)

(3) and 8(b) 4(i),(ii) (A) of the National Labor Relations Act, as amended, herein called the Act.[1] Respondents filed an answer and an amended answer denying the commission of the alleged unfair labor practices.

Upon the entire record,[2] from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. The Business of the Employer Involved

The Charging Party, Amax, is a division of Amax, Inc., a New York corporation with its principal office located in Indianapolis, Indiana. Amax is in the business of mining coal in the States of Indiana, Illinois, Kentucky and Wyoming. Its facility involved in this proceeding is the Belle Ayr Mine located in the vicinity of Gil-

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1. The initial charge in Case No. 27-CB-900 was filed January 8, 1975, and was amended in 1975 on January 14, April 23 and July 3. The initial charge in Case No. 27-CC-571 was filed January 27, 1975, and amended July 3, 1975. A complaint issued on February 14, 1975, in Case No. 27-CB-900 and on April 22, 1975, in Case No. 27-CC-571. These cases were consolidated for hearing on February 12, 1976, on which date an amended consolidated complaint issued. The amended consolidated complaint was further amended on March 25, 1976, and again during the course of the hearing. The amended consolidated complaint encompassed Amax's charges filed in Case No. 27-CB-941 alleging that Respondents violated Section 8(b) (1) (A) of the Act. The parties at the start of the hearing, with my approval, entered into a settlement which disposed of the matters covered by Case No. 27-CB-941.

2. The Charging Party's unopposed Motion to Correct Transcript is granted.

lette, Wyoming, from which Amax annually ships coal valued over $50,000 to points outside the State of Wyoming.

Based on the foregoing, I find that Amax is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act for the Board to assert its jurisdiction over this dispute.

II. The Labor Organizations Involved

It is admitted that Respondents United Mine Workers of America and United Mine Workers of America, Local No. 1854, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues in Perspective*

The UMWA, which represents employees employed in the coal mining industry, is one of the country's largest industrial unions. Amax, the second largest coal producer in the Western United States and the largest in the United States, operates coal mines in Illinois, Indiana, Kentucky and Wyoming. The mine involved here is its Belle Ayr Mine located in Wyoming. It is a surface mine which produces sub-bituminous coal whereas Amax's midwestern mines produce bituminous coal.

Amax's miners are represented by the UMWA. Those employed at the Belle Ayr Mine were covered by the terms of a collective-bargaining agreement effective from November 12, 1971 until November 12, 1974. The agreement covered only the miners employed at the Belle Ayr Mine. In all respects, except for one described *infra,*

the agreement was identical to the National Bituminous Coal Wage Agreement of 1971 negotiated between the UMWA and the Bituminous Coal Operators Association, herein the BCOA. The National Bituminous Coal Wage Agreement covered Amax's midwestern mines by virtue of its membership in the BCOA.

The UMWA in the recent past has negotiated with an object of securing a uniform collective-bargaining agreement for the entire industry. Since the 1950's virtually all of the Nation's bituminous mines whose employees are represented by the UMWA have executed the National Bituminous Coal Wage Agreement. The UMWA's bargaining strategy was to reach agreement with the BCOA and then have the producers of bituminous coal who were not represented by the BCOA sign the agreement without change. The employers who operate surface sub-bituminous and lignite mines in the Western United States, whose employees are represented by the UMWA, were also expected, since at least 1964, to execute *pro forma* the National Bituminous Coal Wage Agreement for their mines.[3] And, as a matter of fact, the contracts between the UMWA and the Western sub-bituminous coal operators, including Amax's, were identical to the National Bituminous Coal Wage Agreement.

Normally when the aforesaid western agreements and the National Bituminous Coal Wage Agreement terminated, the UMWA would negotiate a new agree-

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3. The sole deviation from the terms of the National Bituminous Coal Wage Agreement contained in the separate agreements executed by the western sub-bituminous coal producers was a lower per ton contractual health and retirement fund contribution.

ment with the BCOA and then present this agreement to the western operators for their execution. In 1974, however, the UMWA decided to change this policy. Instead of automatically extended the terms of the National Bituminous Coal Wage Agreement to cover the western mines, the UMWA decided to negotiate a Western Sub-Bituminous Coal Wage Agreement with the western operators. The UMWA contemplated that the Western Agreement would incorporate the language of the National Bituminous Coal Wage Agreement insofar as the language applied to sub-bituminous surface mining but, to meet the needs of the western surface miners and their employers, would otherwise deviate from its language. It was contemplated by the UMWA that the portions of the National Bituminous Coal Wage Agreement dealing with wages, hours, job classifications and health and retirement fund contributions, among others, would be changed for the Western Agreement. Also, the UMWA in November 1974, at about the time of the termination of the existing agreements, requested that the employers who operate sub-bituminous surface mines in the west, whose employees were represented by UMWA, designate a single bargaining representative to negotiate a Western Sub-bituminous Coal Wage Agreement. Several of the western operators agreed to do this and designated one employer representative to bargain with the UMWA on their behalf. The so-called Peabody Group. The UMWA takes the position that Amax was one of the employers that joined the Peabody Group. Amax disputes this.

Amax's separate contract with the UMWA covering its one western mine, the Belle Ayr Mine, was scheduled to terminate on November 12, 1974, along with the

UMWA's other western agreements and the National Bituminous Coal Wage Agreement. The UMWA entered into contract negotiations for new agreements with the BCOA, the Peabody Group, and three or four employers, including Amax, who operated mines in the west. By the time of the hearing in this case, June-July 1976, the UMWA had reached agreement with all of the above employer associations and employers except Amax. On January 12, 1975, the UMWA struck the Belle Ayr Mine, causing it to cease operation until March 1975. The strike still continues.

The amended consolidated complaint in substance alleges that the UMWA and Local 1854, the Respondents, violated Section 8(b)(1)(B), 8(b)(4)(A) and 8(b)(3) of the Act, as follows:

8(b)(1)(B)—Adamantly insisting that Amax agree to contractual provisions providing for the designation of persons not selected by Amax to administer a training program and a pension, health and retirement program, and by threatening to strike and by engaging in a strike to require Amax to bargain through a multiemployer bargaining association.

8(b)(4)(A)—Engaging in a strike for an object of requiring Amax to join and be represented by a multiemployer bargaining association and for a further purpose of requiring Amax to enter into several contractual provisions prohibited by Section 8(e) of the Act.

8(b)(3)—Striking in support of its contract demands without complying with the notice requirements of Section 8(d)(3) of the Act; striking to require Amax to bargain through a multiemployer bargaining association; refusing to meet and negotiate with Amax from

January 6, 1975 until on or about February 3, 1975; insisting to the point of impasse that Amax accept contractual provisions which are nonmandatory subjects of bargaining and accept other contractual provisions which are proscribed by Section 8(e) of the Act; and engaging in overall bad-faith bargaining.

B. *The Facts: A Chronology*

1. The events from September 1974 until January 6, 1975

The UMWA's collective-bargaining agreements pertinent to this case—the agreements covering the subbituminous and lignite mines in the west and the National Bituminous Coal Wage Agreement covering the employer-members of the BCOA and the independent operators who operate bituminous mines in the midwest—were scheduled to terminate at 12:01 a.m., November 12, 1974, upon written notification of termination given by either party at least 60 days prior to the date of the termination. The UMWA on September 10, 1974, gave timely notice of termination to all of the parties, including Amax, who were bound by the aforesaid agreements.

On September 12, 1974, in Case No. 27-RC-4914, the International Union of Progressive Mine Workers of America filed a representation petition with the Board seeking to represent the miners employed at the Belle Ayr Mine. Thereafter, Local 1854 intervened in that proceeding.

On September 18, 1974, Amax's president, Hollie Hopper, wrote UMWA President Arnold Miller that the representation petition filed with the Board by the Progressive Mine Workers raised a question concerning the representation of the Belle Ayr Mine which had to be

resolved by the Board before the parties could negotiate the terms of a new agreement.

On November 2, 1974, UMWA President Miller, by identical letters, notified each one of the approximately 12 employers, including Amax, who operate coal mines in the west, who were signatory to agreements covering these mines with the UMWA, that the UMWA for the past 2 months had been engaged in negotiations with the BCOA for a successor agreement to the National Bituminous Coal Wage Agreement of 1971 and went on to propose that the 12 employers engage in multiemployer bargaining with the UMWA for their western sub-bituminous and lignite mines and stated if they agreed to this proposal, the UMWA would extend their present agreements for a period of 60 days beyond the November 12, 1974 termination date. The letter in pertinent part reads:

> The Union's belief is that it has already been engaged in multiemployer bargaining as a practical matter with the various sub-bituminous and lignite signatories, and proposes to formalize the practice by exercising a single successor Sub-bituminous and Lignite Agreement with an association of sub-bituminous and lignite employers rather than continuing the past practice of executing formally separate contracts with each employer.
>
> Contingent upon your assent to our proposal, the UMWA offers to extend the present Agreement with your company for a period of sixty days beyond November 12, 1974.

Of the several western coal producers who were signatories to contracts, four—Energy Fuels Corporation, Kemmerer Coal Company, Usibelli Coal Mine, Inc. and

Appendix A.

The Peabody Coal Company, herein collectively called the Peabody Group—agreed to engage in multiemployer bargaining provided that each company execute a separate agreement. In return the UMWA granted to each one a 60-day extension of their existing collective-bargaining agreements. Amax, along with some of the other western coal producers, under contract with the UMWA, rejected the UMWA's offer. Specifically, on November 6, 1974, Amax's president, Hopper, wrote UMWA's president, Miller, acknowledging the receipt of Miller's letter of November 2 and took the position that the representation petition filed with the Board by the Progressive Mine Workers prohibited Amax from lawfully engaging in collective bargaining with the Union for a new contract covering the Belle Ayr Mine, and it would have to await the Board's resolution of the representation case before taking any action about the pending contract negotiations.

Thereafter, during November 1974, Elkins Payne, Amax's vice president of administration and employee relations, phoned Ed James, an assistant to UMWA's president, Miller, and reiterated to James the position taken in Hopper's November 6 letter to Miller. In addition, Payne indicated that Amax preferred to bargain independently for the Belle Ayr Mine rather than through the Peabody Group and asked whether Amax would be granted the 60-day contract extension even though it wanted to bargain independendently. James answered that unless Amax joined the Association it would not get any extension of its contract but, in view of the pending representation case at the Belle Ayr Mine, he would consider and discuss the matter with the UMWA's General Counsel.

Appendix A.

On November 10, 1974, by mailgram, UMWA's president, Miller, notified Amax: "UMWA unilaterally agrees to extend current collective bargaining agreement covering your Belle Ayr Mine to 12:01 a.m., December 12, 1974."

On November 22, 1974, an election was conducted by the Board at the Belle Ayr Mine which was won by Local 1854.[4]

On November 23, 1974, Payne *drafted* a letter to UMWA's president, Miller, which stated in substance that Amax, upon the certification of Local 1854, was prepared to begin collective-bargaining negotiations immediately. The letter goes on to state:

> We have been advised from your office that the U.M.W.A. has offered a further extension of the current agreement to January 12, 1975, provided we participate in bargaining with other companies under a single agent selected by such companies. Solely in order to expedite the negotiation of an agreement, we are considering participation in such an arrangement providing our understanding of your proposal, as related to Amax Coal, is correct.
>
> Based upon conversations with representatives from your office and other interested parties, our understanding of the proposal is as follows:
>
> 1. Bargaining will begin in late November and existing agreements for participants will be extended to January 12, 1975.

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4. Local 1854 was certified by the Board on December 9, 1974, as the exclusive bargaining representative of the production and maintenance employees employed at the Belle Ayr Mine.

2. Assuming successful negotiations, any agreement reached will cover only the existing Belle Ayr Mine bargaining unit and will be executed individually for that mine:

3. Participation in bargaining in this instance does not constitute a waiver of rights to bargain independently in the future.

If you agree that our understanding is in accord with your proposal, please sign below and return the copy to me. Upon receipt of confirmation I will contact the designated agent to resolve any other problems which may arise relating to our participation. Due to the time constraints facing us, your immediate response will be greatly appreciated.

Payne did not mail this letter because of a concern which he was unable to satisfactorily reduce to writing, namely, his concern about Amax's role in the bargaining. In view of this Payne arranged to meet on November 25, 1974, with UMWA's general counsel, Yablonski. Amax's president, Hopper, and Ed James, an assistant to UMWA's president, Miller, also were present at this meeting. Payne reviewed the three points set forth in his November 23 letter and also told Yablonski and James that Amax was reluctant to join the Peabody Group because it was Amax's understanding that the votes of the members of the group would be weighed in accordance with tons of coal produced which was not fair, since Amax, although presently only producing about half a million tons at the Belle Ayr Mine, toward the end of the term of the contract would be producing close to 20 million tons. The UMWA officials indicated this was a problem Amax would have to work out with the members of the Peabody Group. The meeting con-

cluded with Amax's representatives stating that when the Company resolved its problems, it would notify the UMWA whether or not it had decided to join the Peabody Group. Then, Payne and Hopper visited their lawyer's office where they reviewed their discussion with Yablonski and James and mailed the letter of November 23, *supra,* drafted by Payne which was now signed by Hopper.

UMWA's president, Miller, affixed his signature, as requested, to the letter of November 23 and, on December 6, 1974, by telegrams notified Amax that he had signed the "letter of agreement submitted by Hopper," that the UMWA expected negotiations would begin in mid-December 1974, and the existing agreement covering the Belle Ayr Mine was further extended from December 12, 1974 to January 12, 1975, and explained that the delay in starting the negotiations with the Peabody Group was due to the necessity for the UMWA to first conclude the bituminous negotiations.

On or about December 10, 1974, Payne phoned Yablonski and told him that Amax had been unsuccessful in making arrangements with the people who were involved in the negotiations for the Peabody Group and Amax intended to bargain independently and Payne wanted to meet with Yablonski to make arrangements to discuss some of the matters pertaining to the negotiations. They agreed to meet December 17, 1974, at the offices of the UMWA in Washington, D. C.

On December 17, 1974, Payne and John Cairns, Amax's director of industrial relations, and Roger Sonnemann, Amax's corporate vice president of administration and employee relations, met with Yablonski and UMWA Staff Representative Don Pierce. Payne in-

formed Yablonski that Amax was not able to make satisfactory arrangements with the Peabody Group and, as a result, intended to bargain independently for a contract covering the Belle Ayr Mine. Yablonski replied in substance that he wondered what Amax's position was on this matter. The Amax representatives then brought up a number of contractual provisions either included in its existing agreement with the UMWA or in the recently negotiated National Bituminous Coal Wage Agreement of 1974 and indicated that Amax would be asking for different provisions in these areas. Yablonski stated that, in negotiating contracts covering the western mines, the UMWA would be seeking uniformity and would use the National Bituminous Coal Wage Agreement of 1974 as a basis for the negotiations. Pierce requested Amax to furnish the Union with certain information needed for bargaining. Amax's representatives indicated they would honor the request.[5] Finally, at the conclusion of the meeting Sonnemann informed Yablonski that he wanted there to be no misunderstanding about Amax's position regarding the negotiations, that he wanted it to be absolutely clear Amax intended to bargain separately for a contract covering the Belle Ayr Mine and the Peabody Group had no authority to bargain for Amax. Yablonski by a nod of his head acknowledged that he understood what Sonnemann had stated and made no remark indicating he disagreed.[6]

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5. Cairns by letter of December 26, 1974, furnished Pierce the requested information.

6. The above description of what occurred at the meeting of December 17 is based on a composite of the credible testimony of Payne, Cairns and Sonnemann. I reject Yablonski's testimony that this meeting was prompted by Pierce's oral requests for information and

Appendix A.

On December 18, 1974, Payne wrote Yablonski a letter which in substance confirmed that in accordance with the parties' discussion of December 17, Amax would negotiate with the UMWA for a contract covering the Belle Ayr Mine; the UMWA would advise Amax in the near future of a specific date when the negotiations would start; Amax was flexible concerning the site of the negotiations and would accept any location selected by the UMWA but expected an equal distribution of the cost for the use of bargaining facilities; Amax planned to use a negotiation team of four persons plus staff specialists as warranted; and, prior to discussing substantive matters, the parties would resolve certain procedural matters pertaining to the negotiations. The letter concluded with a summary of Amax's general bargaining objectives.

On December 6, 1974, the National Bituminous Coal Wage Agreement of 1974 was executed. Thereafter, the UMWA made final preparations for negotiations of a Western Agreement to cover the western sub-bituminous and lignite mines. On December 19, 1974, members of the UMWA staff and the Western Bargaining Council attended the Western District Conference in Denver, Colo-

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that neither Payne nor Sonnemann indicated Amax intended to negotiate independently of any association for a contract covering the Belle Ayre Mine. Pierce was not called upon by the UMWA to corroborate Yablonski's testimony. Also, Yablonski failed to deny Payne's testimony set forth, *supra,* that on or about December 10, 1974, in arranging the December 17 meeting, Payne in effect told Yablonski that Amax had decided to negotiate a contract on its own rather than through the Peabody Group and wanted to meet with Yablonski to discuss some of the matters pertaining to the negotiations.

the UMWA for a contract covering the Belle Ayr Mine and asked that Yablonski contact him about the matter as soon as possible. Cash relayed Payne's message to Yablonski, who, the same day, instructed Cash to notify Payne that Yablonski was under the impression that Amax was part of the Peabody Group and would bargain as a part of that group. Cash told this to Payne, who denied it and immediately sent Yablonski the following telegrapm: "As per our discussion with you on December 17, 1974, it remains our intention that Amax Coal will bargain with the UMWA for the Belle Ayr Mine operation independently." There was no reply to this telegram.

Based upon the district conference meeting, *supra,* and the meeting with the Peabody Group, *supra,* the UMWA staff prepared a package proposal to submit to the western coal producers. The proposal was reviewed by the UMWA Western Bargaining Council and a copy of the revised proposal was submitted on January 6, 1975, to the Peabody Group, Amax and Pittsburg and Midway Coal Mining Company, herein called P & M,[8] all of whose representatives had assembled in Denver, Colorado, for the purpose of negotiating with the UMWA negotiating team. Previously, Yablonski had agreed to Payne's request that representatives of Amax and the UMWA should meet in Denver on January 6, 1975.

2. The meeting of January 6, 1975

On January 6, 1975, five representatives from Amax met with five from the UMWA for about 3 hours in Denver, Colorado. Payne and Cairns headed the Amax team

8. P & M was one of the several coal producers with mines in the west which had chosen not to bargain through the Peabody Group.

rado.[7] The conference was attended by delegates from every mine that would be covered by the Western Agreement. The purpose of the conference was to allow rank-and-file miners to recommend goals to the negotiators. The recently negotiated National Bituminous Coal Wage Agreement of 1974 was reviewed in detail. There was strong collective sentiment that as much of this agreement as possible should be carried over into the Western Agreement. In addition, the delegates specifically endorsed seeking a wage rate and a system of job classifications the Western Agreement which differed from the National Bituminous Coal Wage Agreement of 1974. There was then a brief meeting of the UMWA Western Bargaining Council, and its staff, to prepare for the meeting with the Peabody Group scheduled for the following day.

The first negotiating session between the UMWA and the Peabody Group took place on December 20, 1974, in Denver, Colorado. The meeting was an exploratory session in which the parties reviewed the recently negotiated National Bituminous Coal Wage Agreement, article by article and section by section, and noted the areas of agreement and disagreement.

On December 30, 1974, Payne, who had not heard from the UMWA about contract negotiations, phoned Yablonski's office. Yablonski was out of town so Payne, in substance, told Yablonski's secretary, Sylvia Cash, he was calling about the negotiations between Amax and

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7. The Western Bargaining Council was composed of UMWA International Executive Board members and the presidents of District 15 and District 22, the two districts with jurisdiction over mines that would be covered by the Western Agreement.

and Trbovich, an International Union vice president who was chairman of the UMWA Western Bargaining Council, headed the UMWA team.

Previously, as indicated, *supra,* the UMWA had transmitted a copy of a complete contract proposal to Amax. The proposal, entitled "Western Surface Mine Agreement," was patterned after the recently negotiated National Bituminous Coal Wage Agreement and was identical to the proposal submitted to the Peabody Group and P & M. Amax also submitted a proposed contract to the UMWA which was not a complete package insofar as it lacked provisions for job classifications, wage rates and health and retirement. The contract proposals differed in a number of significant areas and each one made a number of significant changes in the current agreement.

Payne opened the meeting by announcing that Amax's representatives were present to negotiate an agreement and had the authority to reach an agreement. He asked if the UMWA representatives had similar authority. Trbovich and Pierce, a UMWA staff representative, stated they had this authority but any agreement would have to be ratified by the employees.

The parties went through the UMWA contract package article by article. Amax's representatives objected to a significant number of the provisions. An objection was raised to the title of the contract, "Western Surface Mine Agreement," and the reference to "district agreements." Amax also took the position that Local 1854, the certified bargaining representative, should be a party to the contract and that, since Amax was bargaining for a contract to only cover the Belle Ayr Mine, the references to "mines" and "employers" was improper: Amax

further objected to the management rights clause, the successorship clause and the union-security agreement proposed by the UMWA. Amax likewise chalenged the legality and propriety of the UMWA demands pertaining to "work jurisdiction," "coal lands," "contracting and subcontracting," "construction work" and "leasing, subleasing and licensing out of coal lands." Another Amax objection concerned the UMWA's proposed "exemptions clause" which Amax claimed was an improper attempt by the UMWA to control the number of supervisors employed by Amax. Regarding the UMWA pension proposal, Amax objected to making contributions into the "1950 Pension Trust" on the ground that the benefits only went to already retired miners of which there none in the Belle Ayr unit. Amax also objected to contributing into the "1974 Pension Trust" on the ground that the employer trustees were already selected by other employers and Amax would be denied the right to select trust representatives of its own choosing. Also, Amax raised practical and legal objections to being subject to a Joint Western Surface Mining Training Committee whose employer representatives would not be of Amax's own choosing.[9]

The parties agreed to meet again the following evening.

3. The meeting of January 7, 1975

The UMWA general counsel, Yablonski, was its chief negotiator in the bituminous negotiations which re-

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9. Although the concept of this training committee was discussed at the meeting of January 6, the UMWA did not propose it as a contract demand until its January 27, 1975 proposal.

sulted in the National Bituminous Coal Wage Agreement of 1974 and was the chief negotiator in the subsequent sub-bituminous and lignite negotiations involving Amax and the other western surface mines. Following the meeting of January 6, 1975, Trbovich informed Yablonski that Amax had transmitted a contract proposal and the UMWA representatives did not know how to respond. Trbovich requested Yablonski's assistance. Yablonski assigned James Marketti, director of western organizing, to assist the UMWA representatives.

Marketti at the start of the meeting informed Amax's representatives that the UMWA did not intend to negotiate a contract with Amax covering the Belle Ayr Mine but that their prior meeting, as well as the present one, was only for informational purposes. Marketti explained that Amax was a part of the Peabody Group and, as such would negotiate as a part of that group and be covered by the contract the UMWA negotiated with the Peabody Group. In response to Payne's question, Marketti explained that the reason the UMWA representatives had not stated this previously was they had been taken by surprise when Amax handed them a set of contract proposals. Amax's negotiators objected to the UMWA's bargaining position. The parties argued about this matter and finally, at the suggestion of Amax, agreed not to adjourn but to review Amax's contract proposal without either side waiving its position.

The parties reviewed Amax's January 6 contract proposal. Amax's representatives explained why various provisions therein differed from those included in the recently negotiated National Bituminous Coal Wage

Agreement to which Amax was a party.[10] When the question of why Amax intended to formulate its own pension program arose, Gruender, for Amax, advanced the same objections to the UMWA program as were advanced the previous day and also stated that Amax wanted to negotiate only about pension benefits because it regarded the matter of cost as its own business.

Near the conclusion of the meeting Marketti warned that in the event a contract was not reached by January 12, 1975—the date the current contract covering the Belle Ayr Mine was scheduled to terminate—the UMWA would strike. He repeated that Amax was a part of the Peabody Group for contract negotiations and if no contract was reached with the Peabody Group by that date the UMWA would be forced to strike the Belle Ayr Mine as the miners would not work without a contract and, added, Amax could expect "to have problems everywhere. You know how coal miners are." Payne asked what Marketti meant to insinuate by this remark and another company representative asked if Marketti was making a strike threat against Amax's midwestern mines. Marketti did not answer but instead Trbovich spoke to Elkins Payne, stating "come on Elkins you have been in this business for how many years? You know exactly what we are talking about."

The meeting concluded with the Company's bargaining team asking if the UMWA was still refusing to bargain. UMWA's representatives stated they would bargain with Amax but only as a part of the Peabody Group.

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10. Amax's midwestern mines, through its membership in the BCOA, are a part of the multiemployer group covered by the National Bituminous Coal Wage Agreement of 1974.

It was agreed that the UMWA would notify Payne the next day whether it would bargain separately with Amax.[11]

4. The events between January 8, 1975 and February 3, 1975

On January 8, 1975, Yablonski informed Amax, by hand-delivered letter, that the UMWA believed Amax had joined the Peabody Group for purposes of contract negotiations and Amax's withdrawal from this group was untimely, thus, Amax was bound by any agreement negotiated by the Peabody Group with the UMWA. Payne, by letter of January 9, replied that Amax never joined the Peabody Group; if it did join, its agreement to join was null and void because it was coerced; and, if its membership was uncoerced, then it was released because the UMWA breached its part of the bargain.

On January 12, 1975, the UMWA struck the Belle Ayr Mine and the other western coal operators whose employees it represented. Amax's negotiators in an

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11. Four witnesses testified about this meeting. Payne, Cairns and Sarno for the General Counsel and Charging Party. Marketti for the UMWA. The description of what took place is based upon a composite of the testimony of Payne and Sarno. They impressed me as trustworthy and reliable witnesses. Marketti did not. Cairns, with respect to this meeting, did not impress me as a trustworthy witness. Moreover, the reliability of his memory concerning the events is suspect inasmuch as he testified the parties reviewed for the second time a number of the provisions included in the UMWA contract proposal which had already been reviewed at the January 6 meeting. Payne and Marketti both agree that the parties on January 7 reviewed Amax's contract proposal, not the UMWA's proposal.

effort to avoid a strike, on the evening of January 11, 1975, hand-delivered a new contract proposal to the UMWA. Yablonski accepted the proposal but advised Amax's representatives that his acceptance did not constitute an agreement to bargain independently and refused to meet with them or to discuss the proposal. Also on January 18, 1975, Payne by telegram to Trbovich, the chairman of the UMWA's Western Bargaining Council, requested a negotiation meeting. The telegram was ignored.

In the meantime during January 1975 the negotiations for a new agreement between the UMWA and the Peabody Group and between the UMWA and P & M continued. On or about January 15, 1975, the UMWA broke off negotiations with the Peabody Group because a lack of progress in the negotiations had led the UMWA to conclude that further bargaining would not be fruitful. At the time the UMWA broke off negotiations it had prepared a new contract proposal for submission to the Peabody Group and P & M, but instead submitted it only to P & M and continued to meet and negotiate with P & M's negotiating team. In addition, during the week of January 20, an event occurred which prompted the UMWA to sit down and bargain with Amax. The UMWA's general counsel, Yablonski, was notified in substance that the Board's general counsel, based on Amax's unfair labor practice charges, intended to issue a complaint charging the UMWA with violating the Act by refusing to bargain with Amax and, in conjunction with said complaint, intended to seek interim relief by way of a court injunction enjoining the UMWA's conduct.[12]

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12. On January 8, 1975, Amax filed its charge in this proceeding in Case No. 27-CB-900 alleging in sub-

In order to avoid the injunction proceedings and in an effort to settle the alleged unfair labor practices, thus avoiding the issuance of a complaint, the UMWA decided to negotiate with Amax independently. Accordingly, on January 24, 29 and 30, 1975, Yablonski telegraphed Payne that the UMWA was willing to negotiate separately with Amax.[13] Also on January 24, Yablonski forwarded a contract proposal to Amax which was identical to the proposal submitted the same day to the Peabody Group. Payne in reply to Yablonski's telegrams agreed to commence negotiations and a meeting was scheduled for February 3, 1975, in Denver, Colorado.

5. The meetings of February 3, 5 and 6, 1975[14]

During the week of February 3, 1975, the negotiating teams for Amax and the UMWA met in Denver, Colorado, on February 3, 5 and 6.[15] Payne and Yablonski were the chief negotiators.

The parties disagreed on the method of bargaining. Amax preferred to review each and every clause at the

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stance that the UMWA had violated Section 8(b)(1)(B) and 8(b)(3) of the Act by unlawfully requiring Amax to designate some other employer as its collective-bargaining representative.

13. Yablonski transmitted several telegrams in order to satisfy the objections which Board agents voiced concerning the language of the telegram.

14. Cairns testified for the General Counsel and the Charging Party, and Yablonski for the UMWA, about this series of meetings. To the extent their testimony is not consistent, I have credited Yablonski, who impressed me as the more trustworthy witness.

15. During this week the UMWA negotiators were also engaged in bargaining in Denver with both the Peabody Group and P & M.

table and "sign-off" those on which agreement was reach. Yablonski objected on the grounds that it was too time-consuming and portrayed a lack of faith in each other. Amax's method was eventually adopted. Yablonski stated in effect that the UMWA wanted to adhere as closely as possible to the National Bituminous Coal Wage Agreement but where peculiar circumstances applicable to the west warranted a change, it would be made. He further stated that the UMWA wanted a uniform western agreement and was willing to set the pattern for such an agreement with whichever employer or group of employers showed the greatest movement at the bargaining table.

The parties used Amax's contract proposal of January 11 as a basis for discussion during these meetings. However, in the process they also discussed provisions included in the UMWA's contract proposal. On the great majority of significant matters the parties' proposals were poles apart. By the end of these meetings the negotiators signed off, that is, tentatively agreed to about 11 items, all of which were included in the UMWA's contract proposal. The UMWA agreed to nothing not included in its proposal. A substantial number of these "signed off" items had been included in the recently terminated agreement covering the Belle Ayr Mine or were required by law. In a number of areas Amax was in effect asking the UMWA to accept proposals which required the UMWA to give up something included in the recently expired agreement.

During these meetings Amax's negotiators renewed their objections to the UMWA's "exemptions clause" and to its "1950 Pension Trust" as well as the failure of the UMWA to include Local 1854 as a party to the contract.

In response to Amax's objection about the "exemptions clause," Stevenson, a member of the UMWA's negotiating team, in effect stated that the UMWA could not change the language of this provision because it was included in the National Bituminous Coal Wage Agreement.[16]

Another matter for lengthy discussion was the Company's proposal that employees absent for jury duty or funeral or personal or sick leave should receive their regular rate of pay, including regularly scheduled overtime pay. The recently negotiated National Bituminous Coal Wage Agreement and the UMWA's first contract proposal included the payment of regular overtime in connection with bereavement or jury duty or personal or sick leave pay. However, both the National Bituminous Coal Wage Agreement and the UMWA's first contract proposal provided a workday of 7¼ hours with the provi-

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16. Cairns testified that throughout all of the negotiation meetings, including those held during the week of February 3, Amax's negotiators reiterated the same objections of illegality previously uttered at the meetings held on January 6 and 7, 1975. On its face this testimony conflicts with the whole record inasmuch as it is undisputed that Amax changed its bargaining position with respect to a number of the proposals to which it had objected on January 6 and 7. Thus, for example, Amax's contract proposal which was on the bargaining table during the February negotiation meetings included a "successorship clause," a "construction clause" and a "leasing and subleasing out of coal lands" clause, identical in pertinent respects to the UMWA clauses objected to by Amax at the January meetings. Accordingly, throughout this decision where I have concluded that Amax's negotiators voiced objections to specific UMWA proposals alleged to be illegal or nonmandatory bargaining subjects, I have not relied upon Cairns' aforesaid generalization.

sion that miners could be worked 8 hours if they were paid time and one-half for the extra three-fourths of an hour. Since miners employed in surface sub-bituminous mines, like the Belle Ayr Mine, were regularly scheduled to work an 8-hour day, they were regularly paid three-fourths of an hour at the overtime rate. Thus, the contractual language reimbursing them for their regular overtime, in addition to their normal rate of pay, when they were absent for jury duty or sick leave, etc., was intended to compensate them for the amount of money they would normally have been paid. However, the UMWA's January 24 contract proposal, in a concession to the western employers, provided that the employees in these mines who normally worked 8 hours daily would no longer have to be paid time and one-half for hours worked over 7¼ but would instead receive a regular hourly rate for their 8-hour day, albeit they would receive a higher rate than paid those who did not regularly work 8 hours a day. Under the circumstances, the UMWA concluded that, since under its wage-and-hour proposal the western miners would no longer receive regular overtime, the other part of the contract proposal which provided reimbursement for this type of regular overtime to miners absent for various types of leave was inapplicable. Amax's negotiators, however, whose January 11 contract proposal included the payment of regular overtime to employees absent for authorized leave, could not understand why the UMWA no longer wanted this benefit and spent much time arguing with the UMWA's negotiators about the matter. Yablonski in effect explained to them, as described above, why the UMWA had dropped this provision from its contract proposal and that it would not agree to such a proposal which under the circumstances was illusory.

6. The events between February 5 and February 13, 1975

The parties had scheduled another negotiation meeting for Friday, February 7, in Denver, Colorado. No bargaining session was held that day because the UMWA suspended negotiations until the following week. Yablonski came to the scheduled meeting and, in substance, stated that the UMWA was unhappy about the progress of the negotiations, that it felt the Company was dragging its feet, and the UMWA negotiating team was finding it physically impossable to conduct three sets of negotiations at the same time.[17] Yablonski stated that UMWA's president, Miller, had summoned the UMWA negotiating team back to the Union's headquarters in Washington, D. C., where there would be additional staff to serve as negotiators, thereby allowing the Union to meet with Amax at greater length. Yablonski further suggested that the negotiations be resumed under the auspices of the Federal Mediation and Conciliation Service. Payne stated that it was premature to ask the FMCS to assist in the negotiations.

The same day UMWA's president, Miller, telegraphed all of the western coal operators that he was directing the Union's negotiators to return to Washington, D. C., and was assigning addition staff to the negotiating team to insure that the Union "can meet simultaneously with separate companies or groups of companies at the same time to resolve our outstanding disputes." Miller asked the companies to have their representatives contact Yablonski's office on Monday, February 10, 1975, so that negotiations could be resumed.

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17. As noted, *supra,* the UMWA during the week of February 3 was negotiating in Denver with the Peabody Group and P & M in addition to Amax.

On February 10, by letter, Miller requested the assistance of the FMCS in the Union's contractual dispute with Amax and the other western surface sub-bituminous and lignite operators. Miller suggested that mediation was necessary because bargaining with the Peabody Group had gone as far as it could go, that with respect to Amax the hostility at the bargaining table made negotiations almost impossible to conduct, that bargaining with P & M had stalled because this company seemed content to wait for the Peabody Group to reach agreement with the Union, and that other companies who were not members of the Peabody Group had shown little willingness to enter into serious negotiations but seemed to be waiting for a settlement between the Union and the Peabody Group.

Early during the week of February 10, Yablonski and Payne arranged for negotiations to resume on February 13 in Washington, D. C. In connection with the UMWA's request for mediation, Payne took the position that Amax did not feel the assistance of the FMCS was appropriate. Yablonski agreed to resume the negotiations without the presence of the FMCS.

7. The meetings of February 13, 14, 15, 17 and 18, 1975[18]

During the week of February 13, 1975, on 4 separate days bargaining sessions were held in Washington, D.C.

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18. Edelman testified for the UMWA and Cairns for the General Counsel and Charging Party about what happened at this series of meetings as well as the meetings of February 19 and February 26, 1975, *infra*. In general, Edelman impressed me as a witness intent on giving an accurate and truthful account of what oc-

Daniel Edelman, associate general counsel for the UMWA, replaced Yablonski as the UMWA's chief negotiator in the Amax negotiations. Cairns and Payne did most of the bargaining for Amax. Following the procedure used at the previous meetings the negotiators, at Amax's request, reviewed Amax's proposals section by section and signed off those items on which tentative agreement was reached.[19] The review of Amax's contract proposal started with the provisions dealing with wages and hours which was where the parties had left off at the conclusion of their last meeting. By the end of this series of meetings the negotiators had discussed all of Amax's contract proposals and, in the process, also discussed a number of the provisions included in the UMWA's contract proposal.

The parties signed off approximately 31 items, each one of which was included in the UMWA's contract proposal. In some of these instances Amax's proposal differed from the UMWA's proposal and, in signing off the item, Amax retreated from its position. In no case did the UMWA sign off an item that was not included in its contract proposal. As indicated, *supra,* in a number of areas Amax was requesting the UMWA to delete or modify contractual provisions which had been included in the recently expired agreement between the parties. These series of meetings ended without significant prog-

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curred. He impressed me as the more reliable witness. Accordingly, whenever there is a conflict between Edelman's and Cairns' description of these meetings, I have relied upon Edelman's account.

19. This procedure was not followed in the case of the Company's proposals dealing with wages and hours which, at Amax's request, were reviewed as a package.

ress having been made in the negotiatons. The parties' respective bargaining positions were still poles apart.

One of the Company's complaints, voiced repeatedly during these meetings, was it believed the UMWA was simply biding its time until an agreement was reached with the Peabody Group which agreement the UMWA would then expect Amax to sign. Edelman answered in these terms: The UMWA was seeking a uniform agreement to cover all of the sub-bituminous and lignite mines in the west which agreement would differ from the recently negotiated National Bituminous Coal Wage Agreement only to the extent necessary to be responsive to the operational conditions in the west that differed from those in the east and midwest; uniformity in collective-bargaining agreements had been the UMWA's policy historically, not just to insure employees' security, but because of the ease of administering and ratifying uniform agreements; this policy of contract uniformity, however, did not mean that the UMWA was, as contended by Amax, simply stalling with Amax until an agreement was reached with the Peabody Group, but the Western Agreement was evolving through the current negotiations between the UMWA and Amax and between the UMWA and P & M as well as through the negotiations with the Peabody Group; the UMWA could reach agreement first with Amax or P & M rather than the Peabody Group; the UMWA would demand that all of the western employers sign the first agreement executed in the west whether it be with Amax or the Peabody Group as this agreement would set the pattern; and that if the pattern agreement was arrived at with the Peabody Group, the UMWA's position would be that Amax sign an agreement identical to that agreed to with

the Peabody Group except for those areas where Amax was able to convince the UMWA that conditions were genuinely unique to the Belle Ayr Mine so as to warrant a deviation.

Consistent with its policy of contract uniformity, the UMWA refused to "sign off" Amax proposals where punctuations and the placement of paragraphs or the use of certain words and phrases did not coincide with the UMWA's proposal, even though there was no difference in substance. The negotiators spent a substantial amount of time arguing about matters of this nature. Likewise, they argued about the refusal of the UMWA to "sign off" provisions which provided, in pertinent part, that Amax furnish employees free lunches; heat the employees' bathhouse sufficiently to keep them warm; and reimburse employees absent from work on excused leave for their regular overtime in addition to their daily rate of pay. Amax took the position that these provisions offered the employees substantial benefits, yet the UMWA refused to "sign them off" because of its instance upon uniformity. Edelman disputed this and explained to the Company's negotiators in detail why he felt that these alleged increased benefits were in fact illusory.[20] However, in discussing one of the Company's other proposals, Edelman told the Company's negotiators that in order to maintain contract uniformity, the UMWA would "give a lesser benefit [to] the Belle Ayr employees" than proposed by Amax. Also, there was an-

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20. I have considered the disputed provisions described above, in the light of Edelman's explanation for rejecting them, and conclude the record as a whole establishes Edelman acted out of a good-faith belief in taking the position that these proposals did not provide significant benefits to the employees.

other dispute between the negotiators, caused at least in part by the Union's insistence on uniformity, which involved the refusal of the UMWA to "sign off" for a provision proposed by Amax dealing with the operation of new machinery. Cairns stated he could not understand why the UMWA would not "sign off" this proposal inasmuch as the Company's was identical to the UMWA's. Edelman correctly pointed out to Cairns that the UMWA's proposal on this subject was not identical to Amax's and further stated that inasmuch as negotiations with the Peabody Group had produced agreement on language for this provision which differed from the UMWA's proposal, it was the UMWA's desire to bring this changed language to Amax's attention.[21]

In connection with "idle day work," Edelman verbally agreed to a change in the language proposed by Amax when it was pointed out by Amax's negotiators that the UMWA proposal, "Idle day work must be equally shared in accordance with the practice and custom, [and] an idle day over time roster must be kept up to date and posted," did not make sense in the context of a 7-day operation and suggested using different terminology. Edelman agreed that the Company's position made sense and in the UMWA's subsequent contract proposal of February 24, 1975, changed the pertinent language from "over time roster" to "work roster." In addition, Edelman assented to the limitation of the Mine Communications Committee concept to the Belle Ayr Mine alone and to the deletion of any reference to operations on Indian Lands in the discrimination Article. I reject, however, Edelman's undenied testimony that it

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21. The UMWA's modified new machinery proposal was tendered to Amax at the next meeting.

was at this series of meetings that Amax asked that swing shift crews that removed overburden be assigned only for classifications which worked 7 days a week and that the UMWA adopted this proposal. Edelman is mistaken in this respect because the UMWA proposal of February 13, 1975, provides in pertinent part: "employer shall establish swing shifts for those job classifications which perform overburden removal operations which operate on a 7 day continuous basis." Likewise, I reject his undenied testimony that during this series of meetings, in agreement with the Company, the UMWA agreed to delete a reference to coke plants contained in its wages and hours proposal. I am unable to find any such reference in the UMWA's proposals on the bargaining table at that time.

In connection with the so-called "coal lands" clause and the one dealing with employees' bereavement pay, Edelman indicated that the Union agreed to supplement the language of these clauses with a memorandum of understanding dealing with the notice employees were required to give prior to absenting themselves for bereavement leave and that the "coal lands" clause would only apply if the UMWA became the duly recognized bargaining agent of the employees in question.[22] Also, Edelman indicated that, in order to meet an operating

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22. I recognize that on February 17, 1975, when the UMWA submitted its new proposal dealing with the Company's coal lands, it failed to submit a memorandum of understanding which Edelman had previously stated it was prepared to do. Nonetheless, I am of the view that Edelman's undenied testimony that he made such a promise is not so inconsistent with the failure to submit the memorandum with the new proposal so as to make his testimony inherently incredible.

problem peculiar to the Belle Ayr Mine, the UMWA was amenable to drafting a memorandum of understanding which would indicate that it was the intent of the contract that coal could be processed on the 7th consecutive day of work for the purpose of loading unit trains.

Regarding the Company's health and retirement proposal, its negotiators, in response to Edelman's questions, indicated the proposal was not intended to give retirement credit to employees for services rendered prior to the effective date of the agreement, nor was it intended to encompass the concept of portability. Likewise, in response to Edelman's request to see the trust documents for the Company's plan, Payne indicated the documents were not in the possession of the negotiators. Edelman stated the UMWA was opposed to a welfare and pension program which covered only the Belle Ayr Mine but favored a nation-wide plan like the one included in the UMWA's proposal which the UMWA felt offered the employees better protection. The parties argued over which plan provided better benefits.

8. The events between February 18 and February 26, 1975

On February 19, Cairns for Amax submitted a new contract proposal to Edelman and, at great length, accused the UMWA of bargaining in bad faith and expressed the hope that the next time the parties met the UMWA would be more flexible and not negotiate with a closed mind. Edelman refused to engage in a debate.

Amax's contract proposal of February 9, 1975, when viewed in the light of the parties' positions taken at the bargaining table and the contract proposal which it had

supplanted, offered virtually no additional concessions of significance.

On or about February 22, 1975, the Peabody Group and the UMWA entered into an agreement, herein called the Western Agreement, which became effective approximately 1 week later. The miners employed by the several operators covered by the Western Agreement returned to work approximately March 3, 1975. The miners employed by Amax and the other operators whose western mines were not members of the Peabody Group continued to strike. The Western Agreement did not become effective for about 1 week because it had to be approved by the UMWA Western Bargaining Council and then ratified by the membership. All of the membership employed at the western mines represented by the UMWA, including the Belle Ayr Mine, participated in the ratification vote. However, only the votes of the miners employed by those operators who belonged to the Peabody Group were included in the ratification tally. Yablonski credibly testified that members not covered by the Western Agreement were allowed to vote so that the UMWA could use their expression of support for the Western Agreement as ammunition in convincing the other operators to agree to its terms and that if an independent, such as Amax, signed an agreement substantially the same as the Western Agreement it would not be necessary to hold another ratification vote among its employees, thus enabling them to return to work several days earlier.[23]

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23. The UMWA reached agreements with Big Horn Coal Company in the middle of March 1975, with P & M about April 28, 1975, and with North American Coal Corporation about June 6, 1975, covering their western mines. These agreements were significantly

Appendix A.

On or about February 22, the UMWA in the process of submitting the Western Agreement for membership ratification distributed a message to its membership in the west which in pertinent part reads:

> Our negotiations have been held with several companies participating either individually or in groups. We can report to you that as of the time this document is being prepared, we have secured an Agreement with the Peabody Group, which represents . . .
>
> As recommended by the District Conference and pursuant to longstanding International policy, we expect to secure agreement from the remaining companies to the proposed contract submitted to you for ratification. Those companies include [names five companies, one of which is Amax].

* * * * *

Between March 3 and March 15, 1975, the UMWA in its biweekly publication, UNITED MINE WORKERS JOURNAL, in an article announcing the ratification of the Western Agreement, stated that the miners employed by Amax and four other western coal producers remained on strike but had voted on the Western Agreement, "because the UMWA expected to win the same basic contract for them."

9. The meeting of February 26, 1975

On February 26, 1975, a meeting was held at the Washington, D.C. headquarters of the UMWA between Cairns and Edelman at which time the Western Agreement was offered to Amax as a package proposal.

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different from the Western Agreement, thus, they had to be approved by the Western Bargaining Council and ratified by the miners employed at these mines.

The meeting had been arranged to discuss the parties' respective medical and pension proposals. In particular each party had indicated a desire to look at copies of the trust documents of their respective plans. Present at the meeting with Cairns was a Mr. Steinbeck, employed by the Metropolitan Life Insurance Company. Edelman was accompanied by Pierce, a UMWA staff representative, with expertise in this area.

Edelman gave Cairns the pertinent documents for the UMWA's health and retirement programs. Cairns informed Edelman that the Company did not have the trust documents for its plan and Steinbeck stated that his knowledge was in the area of health and accident plans not pensions, and he was without any knowledge about the Company's pension proposal. A summary outline of the Company's health care proposal, which in substance was similar to the outline contained in the Company's contract proposal, was furnished to Edelman and Pierce, who asked several questions which were answered by Steinbeck.

At the end of the meeting Edelman handed a copy of the Western Agreement to Cairns and stated that Amax should consider it as the UMWA's contract proposal. Edelman informed Cairns that Amax's employees would participate in the ratification of the agreement but their votes would not be counted in the final tally and explained the reason for the use of this ratification procedure. Edelman also stated that if the Western Agreement was ratified by the membership, the UMWA expected that Amax would accept the terms of this agreement. Cairns protested.

Also discussed was the subject of the "District Agreements" referred to in the Western Agreement.

Edelman, at Cairns' request, furnished him with copies of these agreements but in effect told Cairns that Amax would not be bound by any of the terms contained in the "District Agreements."[24]

A review of the provisions of the Western Agreement, in comparison with the UMWA's previous contract proposal and with Amax's contract proposal, reveals that the parties' bargaining positions were as far apart as ever. The only concessions of significance which this agreement offers Amax is the provision dealing with the 1950 Pension Trust wherein, in contrast to the UMWA's previous proposal, the Western Agreement does not require payment by the Company into this trust. As noted earlier, Amax's negotiators at the meeting of February 3 objected to contributing into the 1950 Pension Trust inasmuch as it had no employees who were eligible, or could be eligible, for benefits under this trust. Thereafter, the UMWA verified that this was true for Amax and apparently also determined that all of the other western coal producers were in the same situation as Amax. Thus, the Western Agreement, unlike the National Bituminous Coal Wage Agreement of 1974, does

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24. The description of what occurred at this meeting is based upon a composite of the testimony of the sole witnesses, Cairns and Edelman. In testifying about this meeting, neither one impressed me more or less than the other. Generally, their testimony was not inconsistent. In one instance, however, there appears to be a material conflict. Edelman's testimony can be construed to constitute a denial that he told Cairns the UMWA expected Amax to execute an agreement which contained the same terms as the Western Agreement. In this regard, I credit Cairns' whose testimony is consistent with the contemporaneous message, described, *supra,* that the UMWA was distributing to its membership.

not require contributions into the 1950 Pension Trust except to the extent necessary to cover the actual expenses of providing benefits to employees.

10. The meeting of March 4, 1975

This meeting was held in Washington, D.C., at the offices of the Federal Mediation and Conciliation Service. William Hobgood was present for the FMCS. Also present for the first time with Amax's negotiating team was the president of the Company, Hollie Hopper, who was there at Hobgood's suggestion. Yablonski, the UMWA's chief negotiator, had indicated to the FMCS that if the negotiations were to move off "dead center" he felt it was important that some senior company executive be present, so the UMWA negotiators could demonstrate that the problems which had prevented the parties from reaching agreement were the fault of Amax's, not the UMWA's negotiators.

Amax's negotiators in effect stated they did not desire to execute the Western Agreement. They objected to the agreement's health and retirement provisions, in particular to the fact that the Company was not able to select its trustees. They also objected to Article I, the Enabling Clause, stating that it contained unlawful provisions. Likewise, the illegality of the Work Jurisdiction, Exemptions, Coal Lands, Leasing out of Coal Lands, Contracting and Subcontracting, and Construction clauses were challenged. Yablonski, on the other hand, attempted to persuade the Company's negotiators that they should come to an agreement with the UMWA "like Peabody and the others."

Commissioner Hobgood, after listening to both sides, indicated he understood the UMWA's position

with respect to contract uniformity but stated Amax did not want to sign the Western Agreement and asked if there was some middle ground that could be pursued where an agreement might be reached without either party losing face. Yablonski and Edelman indicated that the UMWA would be willing to enter into a memorandum of understanding to clarify the intent of contractual provisions and to enter into a memorandum of understanding which would provide for deviations from the Western Agreement but only if Amax demonstrated that the peculiar nature of the Belle Ayr Mine necessitated such deviations.

11. The meeting of March 7, 1975

On March 7, Payne visited Edelman at the Washington, D.C. offices of the UMWA and expressed a desire to meet with him to explore the use of memorandum of understanding as a device to satisfy Amax's objections to the Western Agreement.

Payne and Edelman agreed this would not be a negotiating meeting in the usual sense. They were meeting only to explore avenues of agreement and further agreed that neither party was waiving its current bargaining position by the conduct of Payne or Edelman at this meeting. Edelman told Payne that he had no authority to commit the UMWA to his (Edelman's) views expressed during their discussion but stated that the UMWA wanted to break the bargaining deadlock and he was convinced that his (Edelman's) thinking would be given careful consideration.

They reviewed every one of the disputed issues.[25]

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25. They were unable to review the matter of health and retirement, as Edelman told Payne that he

Payne voiced Amax's objections. Edelman articulated what he felt would be a memorandum of understanding which would deal with the objections to the Company's satisfaction. Payne also did the same.[26]

The meeting, which lasted about 3 hours, concluded with Edelman stating it was his opinion that it had been a very constructive meeting and there seemed to be a basis for reaching agreement "fairly quickly."

12. The meeting of March 14, 1975[27]

On March 14, a Friday, Payne telephoned Edelman and arranged to meet with him that day at the UMWA's headquarters in Washington, D.C. Payne did not indicate the nature of the visit. Edelman expressed the hope that they would be able to talk along the same lines as their previous meeting.

Later that day, in the middle of the afternoon, Payne, accompanied by Gruender, one of Amax's lawyers, met with Edelman as arranged. Payne presented Edelman with a complete contract proposal, which he described as the Company's "final proposal," and re-

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was unable to intelligently consider the Company's proposal until he was furnished with the basic document for the Company's program. Payne replied that the trust documents were not in his possession.

26. In particular, on the matter of "District Agreements," Edelman proposed a memorandum of understanding stating that the existing District Agreements did not cover the Belle Ayr Mine.

27. Edelman for the UMWA and Payne for the General Counsel and the Charging Party testified about this meeting. In those instances where their accounts do not jibe, I have credited Payne's testimony inasmuch as, with respect to this meeting, he impressed me as the more credible witness.

quested the UMWA to notify Amax by the end of the day whether it accepted or rejected the proposal. A rejection of any part of the proposal, explained Payne, would constitute the rejection of the entire package. Edelman expressed surprise at Amax's conduct and asked whether the avenues of settlement discussed between himself and Payne the previous week were still open. Payne answered in the affirmative. Gruender asked when Amax could expect the UMWA's answer to its "final proposal." Edelman stated he hoped to be able to get back to Payne by the close of business Monday, March 17. Either Gruender or Payne emphasized that if the UMWA by that time did not indicate it would accept the proposal that Amax would consider it as having been rejected and intended to implement the terms of the proposal.

Amax's March 14 contract proposal modified over 40 sections of its previous contract proposal so that they agreed with comparable provisions of the Western Agreement and modified other sections so they substantially conformed with the comparable provisions of the Western Agreement. These concessions, considered with Amax's previous concessions plus the substantial similarity in the economic benefits—wages and fringe benefits—contained in the parties' proposals, establishes that Amax's March 14 proposal significantly narrowed the gap between the parties' bargaining positions even though they still remained far apart about several significant matters.

Gruender and Payne told Edelman about the areas where the Company's proposal differed from the Western Agreement and explained the reasons for the differences. Edelman asked questions which they answered.

Edelman, although he did not expressly state whether the UMWA would accept or reject the offer, stated he felt that in order for the Amax package to be acceptable it would have to include "at least" the UMWA health and retirement program and a common expiration date with the Western Agreement, and that the matter of a common expiration date was of such importance to the UMWA that its absence would prevent the acceptance of the Company's proposal.

Regarding Amax's health and retirement plan, Edelman asked to see the trust documents, explaining to Payne and Gruender that it was not possible for the UMWA staff to intelligently evaluate what Amax was proposing without reviewing the trust documents and for the UMWA to agree to deviate from its own proposal which had historically benefited the employees in the industry for a program as yet not fully defined would be too risky. Gruender in substance answered that no trust documents existed explaining that it was too impractical and expensive to prepare them in advance of the UMWA's agreement, at least agreement in principle, to the retirement plan proposed by Amax. Also, Gruender stated that Amax's insurance program contemplated 10-year vesting and reciprocity with the UMWA pension program or immediate vesting if reciprocity was not available.

13. The events between March 14, 1975 and May 28, 1975

On Monday, March 17, three members of the UMWA Western Bargaining Council met at union headquarters in Washington, D.C., to review the Company's final proposal. They were the only ones able to come to Wash-

ington for a meeting on such short notice. The discussion centered chiefly around the question of whether the UMWA should accept an agreement which did not include a common termination date with the Western Agreement and which included a pension program different from the type of program historically included in agreements signed by the UMWA. Edelman at the end of the day phoned Payne and told him that the Union needed more time and that Amax's final proposal was still under consideration and had been neither accepted nor rejected. Payne took the position that the language therein was not new to the UMWA[28] and its failure to accept the proposal constituted a rejection. Edelman stated that the UMWA would continue to consider the proposal.

On March 17, shortly after the aforesaid phone conversation, Amax telegraphed the UMWA that it intended to place its final offer into effect immediately. On the same day, by letter, Amax notified the miners on strike at the Belle Ayr Mine that the facility, which had remained closed since the start of the strike, would now resume operations, that Amax hoped the strikers would return to work and told them that its final bargaining offer which the UMWA had rejected was equal to and in some cases better than the UMWA's contract pro-

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28. Amax's proposal was comprised of provisions included in the UMWA's Western Agreement, provisions not included in the Western Agreement but which had been included in Amax's previous proposals, provisions which deviated only slightly from the Western Agreement, and a few provisions, i.e., a portion of the pension proposal, substantially different from anything previously submitted to the Union. In short, virtually every significant provision contained in the Company's contract proposal was familiar to the UMWA's negotiators.

posal and further informed them that its negotiations with the UMWA had reached an impasse and that the Company intended to implement the terms of its final offer retroactive to March 14, 1975.

On March 20, the Belle Ayr Mine resumed operations with supervisors and the following week strike replacements and strikers who abandoned the strike began working. As promised, Amax placed into effect its final offer of March 14 retroactive to that date.

On April 10, 1975, Yablonski telegraphed Amax: "UMWA rejects Amax last offer. UMWA last offer stands with the following exceptions: Immediate reinstatement of all employees; Increase of catch up allowance to $500;[29] Dismissal of all litigation."

14. The meeting of May 28, 1975

The next bargaining session took place under the auspices of the FMCS on May 28 at Washington, D.C. The meeting focused on the issues which divided the parties and all of these issues were discussed.

Amax's negotiators pointed out the clauses which it felt the UMWA could not lawfully insist upon.[30]

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29. A reference to the UMWA's proposal for a "retroactivity allowance" which in substance provides that Amax will pay the returning strikers a sum of money in consideration of the extension of the previous agreement and the increase in the cost of living which occurred since the employees' last wage increase.

30. Payne testified that there was a discussion at this meeting about those contract provisions which Amax thought were unlawful and that the Company just generally reviewed its position and recited those "things" that it thought were unlawful. Payne was unable to recall what was stated or what clauses were mentioned.

Yablonski indicated that the demands of the UMWA for a common expiration date with the Western Agreement and for its own pension program would not be compromised. He explained in detail the reasons for the UMWA's insistence on its own pension proposal and pointed out that the Union had never agreed to a pension plan other than a tripartite administered plan sanctioned by Section 302(c)(5) of the Act. Payne took the position that the UMWA had no legitimate interests in either the costs or the administration of such a program but should only be concerned about the benefits. Yablonski, at the conclusion of the meeting, stated that a major issue which the UMWA had not forgotten was the question of reinstating the strikers. Sonnemann, one of Amax's representatives, indicated that this was an issue about which Amax also felt strongly.

The meeting concluded without any change by either party from their prior bargaining positions.

15. The meeting of June 16, 1975

On June 16, Yablonski met in Washington, D.C., for about 5 hours with Roger Sonnemann at the latter's hotel. The meeting was arranged under the following circumstances. Sonnemann, Amax's corporate vice president in charge of administration and employee relations, is not normally a member of the Company's bargaining team but did attend the May 28 bargaining session, as described, *supra*. After the May 28 meeting, Yablonski had mentioned to an official of the FMCS that Sonnemann's presence was very helpful and his presence at future meetings might help the parties reach agreement. The June 16 meeting was arranged by the FMCS.

Sonnemann started the meeting by explaining that Amax's negotiators did not know he was meeting with Yablonski and stated his purpose in meeting with Yablonski was to explore the parties' major differences so as to determine whether the differences could be narrowed to the point where an agreement was possible.

Yablonski and Sonnemann, in a very candid fashion, discussed the major issues separating the parties. Whether this resulted in Yablonski or Sonnemann, or both of them, indicating they would be willing to make significant compromises on a large number of the disputed issues, as Yablonski testified, or whether they indicated only a few areas of possible concession, as Sonnemann testified, is a difficult question. Neither witness, in testifying about this meeting, impressed me as particularly trustworthy. I received the impression that each one was prone to exaggerate. Yablonski to maximize and Sonnemann to minimize the extent of compromise suggested by one or the other. In any event, Yablonski's undenied testimony and Sonnemann's testimony establishes that Yablonski during the discussion of several disputed contractual provisions made statements which were calculated to lead Sonnemann to believe that Yablonski was seriously considering concessions in those areas. Accordingly, at the end of the meeting, Sonnemann asked Yablonski to have the Union submit a revised bargaining proposal to Amax incorporating these concessions which, Sonnemann stated, might help break the bargaining deadlock. Yablonski replied that the UMWA would do this and further stated that he was confident that, with the kind of good will that had been displayed during the just concluded meeting, the parties could reach agreement in the near future.

16. The events between June 16, 1975 and July 21, 1975

On June 20, Yablonski telegraphed Sonnemann that the UMWA was in the process of preparing a new contract proposal for submission to Amax. In reply Sonnemann, on June 23, telegraphed Yablonski that before resuming face-to-face bargaining Amax wanted to review the UMWA's new contract proposal to determine whether a meeting would be constructive. On July 1, by mail, Yablonski transmitted copies of a new contract proposal to Amax.

The new contract proposal was accompanied by a conciliatory letter from Yablonski which in pertinent part explained and summarized the changes made in the UMWA's previous proposal—the Western Agreement—and indicated the areas where the Union felt that there was still substantial disagreement. Yablonski concluded this letter by urging that Amax "evaluate [the July 1 contract proposal] in the spirit in which it has been presented, and that you promptly agree to reopen face to face discussions."

The July 1 contract proposal in a multitude of areas deviated from the terms of the Western Agreement and made numerous concessions in virtually every disputed area.[31] The UMWA remained unyielding, however, with respect to its demands that Amax accept a contract

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31. Also, in the area of sickness and accident benefits the Union, in Yablonski's covering letter, stated it would agree to the Company's proposal if it would furnish to the Union a copy of its plan so that the Union could determine whether the eligibility and administrative provisions were equal or better than the Union's. If so, Yablonski stated, the Union would accept Amax's proposal.

termination date in common with the rest of the industry; accept the UMWA 1974 Pension and Benefit Trusts; and reinstate the strikers to their former jobs immediately upon the end of the strike. Also, in several of the areas where the Union had made concessions the parties' respective proposals were still apart but the overall distance separating them had closed appreciably.

On July 3, upon receipt of the UMWA's new contract proposal, Payne telegraphed Yablonski acknowledging its receipt and stated: "We will review and analyze the new proposal expeditiously and upon completion of the analysis, will contact you." On the same day Amax filed an amended charge in Case No. 21-CB-900 in which it alleged, in pertinent part, that the Union in violation of Section 8(b)(3) was engaging in "bad faith surface bargaining."

Two weeks passed without a word from Amax concerning the Union's new contract proposal or about negotiations. In view of this lack of communication Yablonski on July 17 telegraphed Ian MacGregor, the chairman of the board of directors for Amax, Inc. Yablonski accused Amax of engaging in dilatory bargaining tactics, stating that he had not received any "direct word" from the Company's negotiators, even though the Union's contract proposal had been delivered to them 2 weeks previously. He also informed MacGregor that the UMWA "in line with its interests as a bargaining agent in an energy field and interests of our members as consumers" had investigated the Company's domestic and foreign activities and were convinced "there are a number of areas which merit the lodging of complaints with appropriate agencies, the commencement of litigation and urging various bodies of

[C]ongress to commence inquiries" into Amax's activities. One of the reasons that the UMWA up to now had refrained from engaging in this type of conduct against Amax, Yablonski explained to MacGregor, was that it had hoped Amax and the Union would reach agreement on the terms of a collective-bargaining agreement. Continuing, the telegram sets out Amax's alleged improper activities uncovered by the UMWA and its contemplated actions.[32] The telegram warned that the Union's attorneys would cooperate with the various governmental agencies in investigating and prosecuting Amax for violating the law and concluded:

> Our deadline is July 22, the date of your special stockholders meeting, at which time you will be presented with a copy of the complaint and request for investigation which will be filed with the Federal Trade Commission at noon. At that time we will publically announce the filing of our formal complaint and request the FTC investigate the legality of Standard Oil Company of California's acquisition of 20% of your stock . . . as well as other areas of serious concern under the antitrust laws. . . . Your negotiators have left us with little choice but to bring to the attention of your stockholders and the general public the areas of activity by Amax which we believe to be unlawful. . . . Because of the seriousness of these matters to your

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32. In substance the telegram charges Amax with violating the Elkins Act; engaging in price fixing schemes with other coal and oil producing companies; making illegal contributions in connection with its foreign operation; and violating the antitrust laws by selling 20 percent of its common stock to Standard Oil Company of California.

company . . . I believe that you should be personally aware of our contemplated activities. I will be free to meet with your negotiators to consummate an agreement between the date and hour of this telegram and noon July 22, 1975.

On July 17, Yablonski telegraphed Payne a copy of the aforesaid telegram. The same day Payne by telegram acknowledged receipt of the MacGregor telegram and stated, "pursuant to the request of William Hobgood of the FMCS, we plan to meet with you on July 21 at 1 p.m. as we agreed to do prior to the receipt of your telegram of today."[33]

17. The meetings of July 21 and July 22, 1975

On July 21 and 22, the negotiators met at the offices of the FMCS in Washington, D.C. Yablonski was asked at the start of the meetings about his July 17 telegram to MacGregor and whether the UMWA intended to bargain beyond noon July 22. He answered in the affirmative but explained that if a complete agreement was not reached by that time, then UMWA representatives planned to attend the July 22 Amax special stockholders' meeting as stated in the MacGregor telegram and the UMWA would, as stated in that telegram, also initiate proceedings against Amax with various government agencies.

During these meetings the negotiators discussed at length the first seven articles contained in the Union's July 1 contract proposal. Initially, Amax indicated that, of the disputed items included in the July 1 package, the

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33. There is no evidence that Amax had arranged to meet with the UMWA prior to the receipt of the MacGregor telegram.

following four were acceptable to Amax: (1) The provision concerning the downward adjustment of the cost-of-living allowance; (2) the provision that an employee on bereavement leave would make a reasonable effort to notify the employer of his intended absence; (3) a provision placing a "cap" on weekly overtime after 50 hours; and (4) agreed to pay double time to employees working beyond their normal workday on Saturday. In all other respects Amax rejected the sections included in Articles 1 through 7 which dealt with matters in dispute. Realistically, Amax only agreed to two, not four, of the disputed items inasmuch as the record established that the cost-of-living downward adjustment language had been inadvertently left out from the Company's March 14 proposal and the bereavement leave notice language originated with Amax and was incorporated by the UMWA into its July 1 proposal.

In connection with Article 1, Amax's negotiators objected to the omission of Local 1854 as a party to the agreement and to the inclusion of the "successorship clause" even though it had been included in Amax's March 14 proposal, explaining, through one of its attorneys, that it had come to Amax's attention that the Board's General Counsel had recently issued a complaint challenging the legality of the successorship clause. They also objected to those provisions in Article 2 entitled "Work Jurisdiction," "Exemptions Clause," "Application of this Contract to the Employer's Coal Lands," "Contracting and Subcontracting," "Leasing, Sub-leasing and Licensing Out of Coal Lands" and "Construction." And in Article 3 they objected to a provision entitled "Cooperation and Development of Mine Plans" and objected to Article 6 which provided for a "Mine Communication Committee" despite the fact that the

identical clause was included in Amax's March 14 contract proposal which was still on the bargaining table.

There was no discussion about the parties' health and retirement plans; however, Amax's negotiators did indicate that they still wanted an "independent" health and retirement program and rejected the Union's proposal.[34]

18. The July 22, 1975 stockholders meeting

On the afternoon of July 22, Amax held a special stockholders meeting in New York City for the purpose of ratifying the purchase of approximately 20 percent of its outstanding shares of common stock by the Standard Oil Company of California. The meeting was picketed and leaflets were distributed by the UMWA. Also, UMWA representatives attended and spoke up at the meeting.

The meeting was presided over by the Company's board chairman, Ian MacGregor, who was accompanied on the dias by other corporate officials and directors. In attendance besides the shareholders were UMWA Lawyers Nathan and Chapnick; International Executive Board Members Patterson and Edney; Local 1854 President Grant; and a Belle Ayr Mine striker, Cassiday. During the meeting these UMWA representatives spoke up and recited the FTC complaint filed that day by the UMWA challenging the legality of the sale of stock to

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34. Yablonski and Payne were the two principle witnesses who testified about the above-described meetings. In his manner and demeanor Yablonski impressed me as the more trustworthy witness. Accordingly, where their accounts differ I have credited Yablonski's version, particularly his testimony that the subjects of striker replacement, the withdrawal of litigation and common expiration date, were not brought up or discussed.

Standard Oil, accused Amax of not bargaining in good faith with the UMWA and, in this regard, engaged in a debate with MacGregor who defended Amax's bargaining position. Also, the union attorneys and MacGregor debated the merits of the Company's unfair labor practice charges filed in the instant proceeding and, finally, striker Cassiday stated that he could not understand why Amax was refusing to accept contractual provisions proposed by the UMWA for its Belle Ayr Mine, even though the identical provisions were currently in effect at Amax's several eastern and midwestern mines.

19. The meetings of August 7 and 8, 1975[35]

On August 7 and 8, the next bargaining sessions were held in Louisville, Kentucky. The UMWA was represented by Yablonski, the Company by its bargaining team. The section-by-section review of the Union's July 1 contract proposal which, on July 22, had stopped at Article 7 was resumed. However, at the start of the meetings, an Amax representative recited a list of clauses contained in the UMWA contract proposal—"successorship," "exemptions," "coal lands," "construction," "pension," "work jurisdiction," "leasing and subleasing," "contracting and subcontracting" and "training committee"—which Amax viewed as being unlawful and asked "if they [UMWA] were going to continue to strike to demand what [Amax] considered to be unlawful demands." Yablonski answered "Yes, they would continue their strike."

The parties reviewed at length each disputed section contained in the July 1 contract proposal start-

35. Yablonski and Payne testified about these meetings. In manner and demeanor Yablonski impressed me as the more trustworthy witness. Accordingly, where their accounts differ I have credited Yablonski's version.

ing at Article 8 until they finished the entire proposal. The discussion was completely unproductive. Yablonski explained why the UMWA proposals were reasonable. Amax's negotiators explained why they could not agree to them.

In connection with sickness and accident benefits, Yablonski's covering letter attached to the July 1 contract proposal, as indicated *supra,* stated that if Amax gave him an opportunity to review the documents upon which the Company's sickness and accident insurance proposal was based, there was a possibility that the UMWA could accept the Company's proposal. On August 7, Yablonski asked for a copy of the Company's sickness and accident program's insurance policy. He was informed that a copy was not available and instead was given a booklet which contained an incomplete description of the manner in which the plan was administered.

Regarding the subject of retirement, Yablonski explained that one of the reasons the Union was unable to accept Amax's retirement proposal was that the Union wanted to participate in the administration of the retirement program so as to be assured that the pension fund would be administered in the best interests of the employees and reminded Amax's negotiators that the Union had never been given an opportunity to examine the documents pertaining to the Company's program and stated that until he could examine those documents, Amax was asking the Union to engage in hypothetical bargaining.[36]

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36. I reject Payne's testimony that Amax's negotiators, at these meetings, presented Yablonski with copies of Amax's pension plan, pension trust agreement

Regarding the UMWA's proposals concerning the reinstatement of the strikers and the withdrawal of litigation, there was absolutely no discussion of these matters as Amax's negotiators stated they thought it was premature to discuss those issues inasmuch as there were too many substantive issues dividing the parties.

Yablonski, when the negotiators finished reviewing the UMWA contract proposal, phoned several of the members of the UMWA Western Bargaining Council and told them about the results of the negotiations. The consensus was that in order to reach an agreement, the UMWA would have to modify its July 1 proposal and offer additional concessions. Yablonski was advised to make no further concessions at that time but to meet with the bargaining council the following week to receive further instructions. Yablonski communicated this information to Amax's representatives and the meeting ended.

20. The events between August 8, 1975 and October 9, 1975

On August 18, Yablonski telegraphed Payne that he had met with the Western Bargaining Council and they had concluded that "the lack of any substantial movement by Amax and its failure to make a formal counterproposal leaves us with little choice except to advise you that we will not bargain with ourselves by submitting yet another proposal to you containing still more concessions by us. If and when you desire to engage in serious bargaining, we will be prepared to do

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and reciprocal trust. The transmittal letter forwarding these documents to Yablonski, signed by Payne, was dated August 18, 1975.

so." On August 19, Payne telegraphed Yablonski to the effect that it was the UMWA's conduct which had stalled the negotiations, that the UMWA's July 1 contract proposal contained no substantive concessions and that Amax was prepared to continue bargaining.

21. The meeting of October 9, 1975[37]

Yablonski and Edelman, the UMWA's chief negotiators, were scheduled to leave the employ of the UMWA on October 20, 1975, thus, UMWA Staff Lawyers Richard Trumka and Richard Bank, then executive assistant to the UMWA president, were appointed to replace them as negotiators. They were briefed by Yablonski concerning the bargaining history.

The meeting of October 9, which was held in Indianapolis, Indiana, Amax's corporate headquarters, was initiated by Trumka under the following circumstances. In assessing its bargaining position after the almost 2-month hiatus in negotiations, the UMWA recognized that its bargaining position had eroded significantly;[38] so, to reach agreement it would have to make substantial revisions in its last contract proposal. It was also expected that the revisions would make the agreement so different from the National Bitumin-

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37. Cairns and Trumka were the principal witnesses who testified about this meeting. In those instances where their testimony is inconsistent, I have credited Trumka's account inasmuch as he impressed me as the more trustworthy witness.

38. The UMWA's strike had failed. A substantial number of the strikers had returned to work, the post-strike complement of employees was substantially greater than the prestrike employment complement and, in comparison to the prestrike period, the Belle Ayre Mine's production had substantially increased.

ous Coal Wage Agreement and the Western Agreement that it would have a significant nationwide impact on further agreements and negotiating procedures. Accordingly, a meeting of the UMWA National Bargaining Council was scheduled for October 10 in Indianapolis, the day following the bargaining session between the UMWA and Amax. Trumka's purpose in arranging this bargaining meeting was to determine what, if any, possible areas of compromise existed which could be discussed with the UMWA National Bargaining Council, the next day, in an effort to draft a revised contract proposal.

At the start of the October 9 meeting Bank and Trumka stated that the purpose of the UMWA in asking for the meeting was to find out whether the Company was amenable to compromise in any of the disputed areas as they needed this information in order to secure bargaining instructions from the National Bargaining Council which was scheduled to meet the next day in Indianapolis. Trumka further stated he had authority to negotiate a contract on behalf of the UMWA and felt that the UMWA's new bargaining team would have more flexibility than the previous one because the bargaining position of the UMWA had weakened. Payne replied that he did not feel it was appropriate for Amax to reveal its "bottom line," but he would identify the areas in dispute where the Company felt there was a possibility for compromise and those which the Company felt so strongly about that compromise did not seem likely. In this last category, Payne stated that any contract would have to be self-contained without any memorandum of understanding; be drafted in unambiguous language; include an express no-strike agreement; terminate 3 years from the date of ratification

and not in common with the Union's other agreements in the industry; and contain no unlawful clauses. In response to Bank's inquiry, Sulley, for Amax, read off the clauses which Amax claimed were illegal. Regarding the demand for an express no-strike agreement, raised for the first time at this meeting, Trumka explained that within the Union politically this would be impossible for the UMWA to accept inasmuch as historically contracts signed by the UMWA had never contained such a clause. Payne replied that the Company needed protection from the wild-cat strikes which had occurred in its midwestern mines but admitted that no such strike had occurred at the Belle Ayr Mine.

During the meeting while attempting to explore the possible avenues of compromise, Bank asked Payne about the possibility of the UMWA accepting Amax's health and retirement proposal in return for Amax's acceptance of the UMWA's proposed common expiration date. Before Payne could answer, Sulley, an Amax attorney, in effect answered in the negative. He stated: "if we give you a signal or any indication of what we're will to give, we've failed."

The meeting concluded with the parties agreeing to resume negotiations at Denver, Colorado, on October 21 and 22, 1975.

22. The meetings of October 21-22, 1975[39]

On October 21 and 22, the negotiating teams met in Denver, Colorado. The UMWA negotiators at the

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39. Cairns and Trumka testified about these meetings. In those instances where their testimony does not jibe, I have credited Trumka, who impressed me as the more trustworthy witness.

start of the meeting indicated that the UMWA accepted Amax's demand that the collective-bargaining agreement be self-contained without any memorandum of understanding. However, they stated that any agreement signed by the UMWA would have to include the UMWA health and retirement proposals and a common expiration date with the UMWA's other agreements in the industry.

All of the disputed items were discussed at length. The parties reached tentative agreement on some items, in a few areas the UMWA indicated it was prepared to make concessions,[40] but the parties remained deadlocked over the great majority of the disputed provisions.

23. The UMWA contract proposal of November 14, 1975

On November 14, 1975, the UMWA transmitted a new contract proposal to Amax accompanied by a written explanation. The new proposal, when compared with the UMWA's July 1 proposal and Amax's current one, made a substantial number of concessions or compromises. The written explanation explained each change and the reason for the change and further expained why the UMWA, in certain major areas, could not accede to Amax's requests. The letter of explanation also noted that the Union was not withdrawing its previous proposal "that all litigation generated by the dispute at the Belle Ayr Mine be dismissed." Also,

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40. In one such instance the UMWA negotiators indicated it would amend its contract proposal to require, as proposed by Amax, that idle day work, premium time and overtime be shared within classifications. Nonetheless, when the UMWA thereafter asked Amax to sign off this proposal, it refused.

the proposal itself contained a provision which required that the Company in substance agree to reinstate all striking employees to their former jobs with their original seniority.

24. The meeting of November 26, 1975

On November 26, 1975, the negotiating teams met at which time the UMWA further expained its new contract proposal. Amax's negotiators indicated the Company would present a new contract proposal at the next negotiating meeting.

25. The meetings of December 7-8, 1975

The negotiating teams met on December 7 and 8, 1975, in Salt Lake City, Utah, at which time Amax submitted certain modifications to its last contract proposal of March 14, 1975. These changes, in their totality, are *de minimus*. Aside from whether this new proposal includes significant or *de minimus* concessions, the record establishes that in this proposal Amax in effect repudiated former proposals included in its March 14 proposal which the UMWA had agreed to accept (regular overtime pay for military duty leave and birthday holiday leave) and modified another proposal contained in the March 14, 1975 proposal (construction clause) which the UMWA had agreed to accept.

No progress was made during these meetings.

26. The events between December 8, 1975 and February 17, 1976

There was a hiatus in the bargaining between the meetings of December 7-8, 1975 and February 17, 1976, due to the fact that an independent union petitioned

the Board for a representation election at the Belle Ayr Mine. The parties suspended negotiations until this petition was dismissed by the Board, at which time the UMWA requested a resumption of the negotiations which resulted in the parties meeting on February 17 and 18, 1976.

27. The meetings of February 17-18, 1976

The UMWA negotiators at the start of these meetings indicated that Amax's March 14 contract proposal, as modified by the one made during the meetings of December 7-8, 1975, was inadequate and the UMWA had expected more movement in response to its November 14 contract proposal.

The negotiators went over the disputed items and reached tentative agreement on several. In addition, Amax indicated that it would agree to the UMWA's union-security proposal in exchange for Amax's "Enabling Clause" language and made one or two concessions in the area of health and safety.

28. The events from February 18, 1975 to the date of the hearing

There have been no further bargaining sessions since the one held February 18, 1975. The parties have corresponded about the course of bargaining and about specific contract provisions with each party blaming the other for the failure to reach agreement. The strike continues.

C. *Discussion and Ultimate Findings*

1. The failure to comply with Section 8(d)(3) of the Act

The complaint alleges in substance that the UMWA violated Section 8(b)(3) of the Act by striking Amax's

Belle Ayr Mine without notifying the Federal Mediation and Conciliation Service (FMCS) as required by Section 8(d)(3) of the Act. In pertinent part, Section 8(d) provides that no party to a collective-bargaining agreement shall modify or terminate such agreement unless the party desiring such termination or modification—

> (1) serves written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof . . .
>
> * * *
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute . . .
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of 60 days after such notice is given . . .

The penultimate sentence of this section contains the "loss of status" provision which recites that—

> Any employee who engaged in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Sections 8, 9, and 10 of this Act . . .

The UMWA by its letter of September 10, 1974, notified Amax it desired to negotiate a collective-bargaining agreement to replace the existing one covering the Belle Ayr Mine which was scheduled to expire November 12, 1974. The old agreement was thereafter extended until January 12, 1975, and when no new agreement was reached by that date the UMWA termin-

ated the agreement and commenced a strike against Amax which is still in progress. As of January 12, 1975, the UMWA had not sent written notice to the FMCS about its dispute with Amax involving the Belle Ayr Mine. The only written notices transmitted by the UMWA to the FMCS pursuant to Section 8(d)(3) were the September 11, 1974 and October 17, 1974 letters from UMWA President Miller to FMCS Director Usery. The September 11 letter states, in pertinent part, that the UMWA had notified the signatories of its National Bituminous Coal Wage Agreement of 1971 that the UMWA intended to terminate these agreements. Attached to this letter was a copy of the letter of termination sent by the UMWA to the employer association—the BCOA—which negotiated the National Bituminous Coal Wage Agreement and a copy of a letter of termination sent by the UMWA to the independent signatories of this agreement.[41] It is undisputed that the September 11 letter from Miller to Usery, including its attachments, did not specifically refer to the dispute between Amax and the UMWA involving the Belle Ayr Mine. The October 17 letter from Miller to Usery in pertinent part states that "in accordance with the requirements of Section 8(d) of the National Labor Relations Act," the UMWA was notifying the FMCS that the UMWA was engaged in negotiations with the signatories to the National Bituminous Coal Wage Agreements of 1971 which the UMWA intended to terminate effective November 12, 1974, and that no new agreement had been

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41. There is a dispute whether a copy of the termination letter sent to the North American Coal Corporation, a western sub-bituminous coal operator, was attached to the September 11 letter. I have not resolved this question inasmuch as I fail to see its relevance.

reached by the parties. The letter did not refer to the dispute between Amax and the UMWA involving the Belle Ayr Mine.

Based on the foregoing, I find that the UMWA did not give written notice to the FMCS concerning the existence of a contractual dispute between the Union and Amax involving the production and maintenance employees employed at the Belle Ayr Mine. Nor is there evidence that as of January 12, 1975, the UMWA had orally notified the FMCS about the existence of this dispute. The assertion of the UMWA advanced in its post-hearing brief that Yablonski, prior to January 12, 1975, verbally notified officials of the FMCS about this dispute is without support in the record.[42] In view of this I have not considered the UMWA's argument that timely verbal notice from the UMWA to the FMCS about the contractual dispute between Amax and the UMWA satisfied the UMWA's obligation under Section 8(d)(3) of the Act.[43]

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42. All the record shows is that on or about December 6, 1974, Yablonski told a mediator employed by the FMCS that Yablonski would be the principal negotiator for the UMWA in the contract negotiations involving the western surface mines. There was no mention of the Union's dispute with Amax.

43. Although Section 8(d)(3), unlike Section 8(d)(1), is not worded in terms of "written notice," the regulations of the FMCS provided that "the notice of dispute filed with the FMCS to the provisions of Section 8(d)(3) . . . shall be in writing." 29 CFR 1402.1 (1971). The Board has never specifically held that the term "notifies" in Section 8(d)(3) means written notification. In *Blue Cab Company,* 156 NLRB 489, cited by the Charging Party, the Board did not have to resolve this issue because the verbal notice involved was not timely within the meaning of Section 8(d).

Based on the foregoing, I find that by failing to give notice of the existence of a dispute between it and Amax to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of the existing collective-bargaining agreement, pursuant to Section 8(d)(4) of the Act, the UMWA violated Section 8(b)(3) of the Act.

I precluded the UMWA, at the hearing, from calling officials of the FMCS to demonstrate that the FMCS, during the relevant period of time, knew about its dispute with Amax involving the Belle Ayr Mine. Since Section 8(d)(3) by its terms specifically requires that the UMWA notify the FMCS about the existence of this dispute, I rejected the contention of the UMWA that the requirement of Section 8(d)(3) would be satisfied by simply showing that the FMCS had knowledge about the dispute. In its post-hearing brief the UMWA renews this contention, urging that "where mere notice is required, the standard is actual personal knowledge," citing *Ohio Oil Company*, 91 NLRB 759, and *N.L.R.B.* v. *Vapor Recovery Systems Co.*, 311 F.2d 782 (C.A. 9). These cases, which stand for the proposition that to be effective written notice must be actually received, are inapposite to the question involved herein.

2. Amax's membership or nonmembership in the Peabody Group and if Amax did not join this group, did the UMWA engage in coercive conduct designed to compel Amax to designate the Peabody Group as its representative for the purposes of collective bargaining

a. *Amax's membership or nonmembership in the Peabody Group*

The complaint alleges in substance that the UMWA violated Section 8(b)(1)(B) of the Act by threatening to strike and engaging in a strike to compel Amax to designate a multiemployer bargaining association, the Peabody Group, as its bargaining representative. In deciding this issue it is necessary to answer the threshold question of whether, as contended by the UMWA, Amax designated the Peabody Group as its collective-bargaining representative. The facts pertinent to this issue, which are set forth in detail, *supra,* can be briefly summarized.

The collective-bargaining agreement between the UMWA and Amax covering the Belle Ayr Mine, scheduled to terminate November 12, 1974, was limited solely to that bargaining unit. Amax, in signing this agreement, did not do so as a part of an employer association. Likewise, each of the other coal producers that operate sub-bituminous and lignite mines in the west, whose employees were represented by the UMWA, were parties to separate, albeit identical, contracts with the UMWA covering separate bargaining units. On November 2, 1974, UMWA's president, Miller, offered to extend each of these agreements until January 12, 1975, if the operators agreed to bargain together as a part of a multiemployer

bargaining association. Several of the employers accepted Miller's offer and formed the so-called Peabody Group which designated a single representative to bargain on behalf of its members. Amax was not able to act upon the UMWA's proposal because an independent labor organization had filed a representation petition seeking to represent the employees employed at the Belle Ayr Mine, thus, blocking contract negotiations. The UMWA extended Amax's contract until December 12, 1975, not the full 60 days allowed those employers who joined the Peabody Group. The question concerning representation blocking the negotiations for a new contract at the Belle Ayr Mine resolved itself when UMWA Local 1854 won the representation election, whereupon, by letter of November 23, 1974, Amax's president, Hopper, informed UMWA's president, Miller, that Amax was prepared to begin contract negotiations and stated that he understood that the UMWA "has offered a further extension of the current agreement to January 12, 1975, provided we participate in bargaining with other companies under a single agent selected by such companies." Continuing, the letter states "we are considering participation in such an arrangement providing our understanding of your proposal . . . is correct." After reciting Amax's understanding of the UMWA's proposal, the letter concludes: "if you agree that our understanding is in accord with your proposal, please sign below and return a copy to me. Upon receipt of confirmation I will contact the designated agent to resolve any other problems which may arise relating to our participation." On December 6, 1974, Miller telegraphed Hopper that he had executed Hopper's November 23 letter of agreement, that contract negotiations between the UMWA and the Peabody Group would start in the middle of December,

and that the termination date of Amax's contract was extended until January 12, 1975. On December 10, 1974, Amax's vice president of administration and employee relations, Payne, phoned Yablonski, the UMWA's general counsel and its chief negotiator, and advised him that Amax intended to bargain independently rather than through the Peabody Group. Yablonski voiced no objection and arranged to meet with Payne on December 17, 1974, to discuss matters pertaining to the contract negotiations. This meeting took place as scheduled and, at the start of the meeting, Payne reiterated that Amax had not been able to make satisfactory arrangements with the Peabody Group and as a result intended to bargain independently. Likewise, Amax's corporate vice president for administration and employee relations, Sonnemann, told Yablonski that Amax wanted it understood it intended to bargain separately for a contract covering the Belle Ayr Mine and the Peabody Group had no authority to bargain for Amax. Yablonski voiced no objection to either Payne's or Sonnemann's statements. The next day, December 18, 1974, Payne wrote Yablonski a letter which in substance was reasonably calculated to inform Yablonski that Amax intended to negotiate a contract for the Belle Ayr Mine using its own negotiators and did not intend to delegate this authority to the Peabody Group. On December 20, 1975, the negotiations between the Peabody Group and the UMWA commenced. Amax never advised the Peabody Group that it had the authority to bargain on Amax's behalf. Quite the contrary, early in December, Amax informed the Peabody Group that it did not intend to bargain as a part of that group.

The UMWA argues that Amax's letter of November 23, 1974, constitutes an unequivocal intention to be

bound in collective bargaining by the Peabody Group rather than through individual action.[44] I disagree. On balance, I am of the opinion, the letter does not evince an unequivocal intent to be bound by group bargaining, rather it indicates that Amax was "considering participation" in the Peabody Group contingent upon two conditions. First, the confirmation that Amax's understanding of the UMWA's proposal was correct and, second, Amax's ability to resolve any problems with the Peabody Group pertaining to Amax's participation in that group. The first condition was met when UMWA's president, Miller, signed Amax's letter of November 23. The second condition was never met because Amax, as described *supra,* upon speaking with officials connected with the Peabody Group, promptly notified the UMWA that it was not able to reach a satisfactory understanding with that group, hence, it intended to bargain separately. Under the circumstances, I cannot conclude that Amax's conduct manifested an unequivocal intention to be bound by group bargaining. In any event, assuming that the November 23 letter demonstrates an unambiguous intent to engage in group bargaining, Amax extricated itself from this relationship by making a timely and unambiguous withdrawal from that arrangement. Thus, on December 10, December 17 and December 18, 1974, prior to the start of the collective-bargaining negotiations between the UMWA and the Peabody Group, Amax gave unequivocal notice of its intent to abandon

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44. The test to be applied in determining if Amax was obligated to bargain through the Peabody Group is whether Amax indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action. *Custom Colors Contractors,* 226 NLRB No. 120, slip opinion at pages 6-7 and cases cited note 8.

group bargaining through the Peabody Group and to pursue negotiations on an individual basis.[45] For all of these reasons, I find that Amax was not a part of the multi-employer group, known as the Peabody Group, and did not designate that group as its representative for the purpose of collective bargaining.[46]

b. *The alleged coercive conduct designed to compel Amax to designate the Peabody Group as its collective-bargaining representative*

The complaint alleges that "on or about November 2, 1974, and thereafter, Respondents, by threat of strike attempted to coerce the Employer in its selection of its collective-bargaining representative by offering to extend the existing agreement if the Employer would agree to bargain through an employer-association, the so-called Peabody Group," thus violating Section 8(b)(1)(B).

On November 2, 1974, UMWA President Miller offered to extend Amax's contract's termination date from November 12, 1974, to January 12, 1975, provided that

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45. In *Retail Associates, Inc.*, 120 NLRB 388, 395, the Board set forth the rules governing the withdrawal of an employer or a union from multi-employer bargaining. An employer may withdraw without the union's consent prior to the start of bargaining by giving unequivocal notice of its intent to abandon the multiemployer unit and to pursue negotiations on an individual basis.

46. An additional reason for concluding that Amax did not designate the Peabody Group as its bargaining representative is the fact, as found *infra*, that Amax's letter of November 23 was a product of the UMWA's coercive tactic proscribed by Section 8(b)(1)(B) of the Act.

Amax agree to designate as its representative for the purpose of negotiating a new collective-bargaining agreement an association of employers known as the Peabody Group. In and of themselves the words contained in Miller's November 2 letter do not constitute restraint or coercion within the meaning of Section 8(b)(1)(B); however, the difference between permissible or coercive language often lies in an analysis of the context in which the words are uttered, e.g., *Local 901, International Brotherhood of Teamsters, etc.* v. *Compton,* 291 F.2d 793, 797 (C.A. 1). Here, pursuant to the UMWA's tradition of "no contract—no work," the Belle Ayr miners could not continue to work when the collective-bargaining agreement terminated. This was common knowledge and the UMWA must have known that Amax was aware of it. Under the circumstances, Miller's November 2 letter was reasonably calculated to constitute a non-too-subtle threat to strike Amax immediately upon the termination date of the current agreement if Amax failed to honor the UMWA's request that it designate another employer as its bargaining representative.

The UMWA suggests that the effect of this threat was successfully repudiated by the 30-day extension granted Amax on November 10, 1974, even though it had not agreed to designate the Peabody Group as its bargaining representative. I disagree for the reason that Ed James, an assistant to President Miller, subsequent to Miller's November 2 letter, informed Payne, an Amax official, that if Amax did not agree to join the Peabody Group, as requested by Miller, the UMWA would not extend the current agreement. In the same conversation James left the door open for an extension due to the fact that there was a question concerning the UMWA's status as bargaining representative due to the pendency

of the election petition filed by another labor organization. James' remarks were calculated to lead Amax to believe that the reason its current agreement was extended 30 days was related to the question concerning representation cause by the election petition and that otherwise its failure to join the Peabody Group would have resulted in an immediate strike. Also, the fact that Amax only received a 30-day extension, whereas those employers who joined the Peabody Group received an extension of 60 days was calculated to foster this impression. Under these circumstances, the fact that the UMWA extended the termination date of Amax's agreement for 30 days is insufficient to effectively repudiate Miller's threat.

Based on the foregoing, I find that in violation of Section 8(b)(1)(B) of the Act, the UMWA restrained or coerced Amax in the selection of its representative for the purposes of collective bargaining by threatening to strike Amax if it did not designate an association of employers, the Peabody Group, as its representative for the purpose of negotiating a new collective-bargaining agreement.

c. *The alleged strike to compel Amax to join the Peabody Group*

The complaint alleges that the UMWA engaged in its strike against Amax, which commenced January 12, 1975, "in order to compel the Employer to bargain through a multi-employer association," thus, violating Section 8(b)(1)(B), 8(b)(3) and 8(b)(4)(A) of the Act.

The only evidence predating the strike which even colorably demonstrates that the strike was designed to

force Amax to select another employer—the Peabody Group—as its bargaining representative is the fact that in an effort to compel Amax to designate the Peabody Group as its representative, the UMWA, as found *supra,* engaged in the coercive tactic of promising not to strike Amax, as scheduled, if it joined the Peabody Group. This is not sufficient, in the circumstances of this case, to prove that the subsequent strike was motivated either in whole or in part by a desire to compel Amax to designate the Peabody Group as its representative for purposes of collective bargaining. The record overwhelmingly establishes that due to the tradition of "no contract—no work" embodied in the UMWA constitution, the strike against Amax would have occurred when it did regardless of whether or not Amax joined the Peabody Group. On January 12, 1975, the UMWA struck all of the western coal operators whose employees it represented, those who were part of the Peabody Group, as well as those who, like Amax, had elected to negotiate independently. Membership in the Peabody Group provided no protection against the strike. There is no evidence that during the strike the UMWA conducted itself in a manner which indicated that an object of the strike was to compel Amax to designate the Peabody Group as its bargaining representative.[47] Under these circumstances, the evidence does not preponderate in favor of a finding

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47. The UMWA's refusal for over 1 month to negotiate separately with Amax, apart from the Peabody Group, as well as its effort to have Amax sign a contract containing terms and conditions of employment identical to the agreement signed by the Peabody Group, while relevant in assessing whether the UMWA bargained in bad faith, as discussed *infra,* is not persuasive evidence that the strike was motivated by a desire to have Amax join the Peabody Group.

that the strike was motivated in whole or in part to compel Amax to designate another employer as its representative for the purposes of collective bargaining. Accordingly, I shall recommend that these portions of the complaint be dismissed.

3. *The contract proposals which allegedly require Amax to select another employer as its representative for purposes of collective bargaining*

a. *The UMWA health and retirement funds*

The UMWA health and retirement funds, herein called the Funds, provide comprehensive health and retirement benefits to coal miners and their families. The UMWA's contract proposal provided that Amax, on behalf of its employees, contribute to the Funds. The Funds' provisions are set out in several documents which are incorporated into the UMWA's contract proposal and are made a part thereof. The Funds' provisions, pertinent to this proceeding, are briefly summarized herein.

The trusts established to administer the Funds are designated as irrevocable trusts under Section 302(c) of the Labor Management Relations Act of 1947, herein called LMRA. They are comprised of three trustees, one "appointed as the representative of the employers," another "appointed as a representative of the Union," and a neutral trustee selected by the others. The trustees' status is defined as that of fiduciaries within the meaning of the Employee Retirement Income Security Act of 1974. They are appointed for at least the duration of the collective-bargaining agreement and may be removed by the party that appointed them only for "cause." They are paid out of the Funds' assets.

Appendix A.

The trustees' authority to establish or affect the level of benefits is restricted by the terms of the trust documents. Also, the amount for each category of benefit, the eligibility requirements for each category, the exact level of benefits, and the amount of employer contributions to be allocated to the various classes of beneficiaries are set out in detail. Nevertheless, the trustees have sufficient discretion so as to significantly affect employees' health and retirement benefits by virtue of their following authority:

(1) They have the power to provide health benefits to any participant receiving pension benefits and who "is not earning more than an amount to be determined by the trustees";

(2) They have the power to provide health benefits to persons who have been "unemployed for a period of time to be determined by the trustees (but in no event for more than 1 year) immediately following the date of termination of such employment";

(3) They have full and final determination as to all issues concerning eligibility for pension benefits;

(4) They have the power to select and set the criteria for "acceptable" insurance carriers and to compel employers to cease doing business with "unacceptable" insurance carriers;

(5) They are empowered to investigate disputed insurance claims;

(6) They have the authority to determine whether employers have violated their contractual

obligations and, if so, to pursue legal remedies on behalf of the beneficiaries;

(7) "In the event the assets of the 1974 Benefit Trust become insufficient to pay the benefits provided . . . the benefits may be suspended or reduced to amounts which in the judgment of the trustee, can be paid from assets of the 1974 Benefit Trust";

(8) "Trustees are authorized to promulgate rules and regulations to implement [the pension plan] and those shall be binding on all persons dealing with participants claiming benefits under this plan";

(9) Subject to the Funds' terms and the applicable statutes, "the trustees shall have full authority . . . with respect to administration of coverage and eligibility, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters";

(10) ". . . [T]rustees shall not be limited in their administration of the Trust from [a] providing improved services under changing methods of delivery or health care as long as any such action does not materially increase the cost of the Trust, or [b] taking such other actions which in their best judgment will preserve the financial integrity of the Trust"; and

(11) "The trustees . . . are further authorized . . . to do all acts which they deem necessary or proper and to exercise any and all powers of the Trustees under the [various instruments which establish the Funds] under such terms and condi-

tions as they may deem to be for the best interest for the Trust."

The Funds were already established when the UMWA first proposed that Amax contribute to them, thus, the trustee appointed by the Employer already had been selected and was named in the UMWA's proposal. Amax promptly and repeatedly throughout the negotiations objected to the UMWA's health and retirement proposal on several grounds, one of which was that it had no voice in the selection of the employer trustee.[48] Nevertheless, the UMWA, as described in detail *supra,* insisted to a point of impasse, with strike pressure, that Amax agree to a collective-bargaining agreement which included this proposal. The complaint alleges that the Respondents violated Section 8(b)(1)(B) and 8(b)(3) of the Act in that they "adamantly insisted on the inclusion of Pension and Health and Welfare Trust Provisions, by the terms of which the trustees . . . would not be selected by the employer."

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48. The Funds' management trustee was designated by employers whose mines are covered by the National Bituminous Coal Wage Agreement of 1974, a multiemployer bargaining unit represented by the Bituminous Coal Operators Association (BCOA). Since Amax is a member of the BCOA and its midwestern mines are covered by the National Bituminous Coal Wage Agreement of 1974, Amax had a voice through its membership in the BCOA in the selection of the Funds' management trustee. Here, Amax, however, is negotiating with the UMWA for a contract covering its western mine, a separate bargaining unit. Accordingly, if the Funds' trustees are representatives for the purposes of collective bargaining, Amax is entitled to have the sole voice in the selection of its representative free from impermissible restraint or coercion.

There are few matters more properly the mandatory subject of collective bargaining than the UMWA's proposal that Amax contribute moneys into a program to furnish Amax's employees with health and retirement benefits. Likewise, insofar as this proposal established a procedure to administer the program which, as described *supra,* significantly affects the employees' terms and conditions of employment, it is also a mandatory subject of bargaining. The administration of the program, however, includes the designation of a management trustee, not selected by Amax, thus, the question for decision is whether the Funds' trustees, who are appointed by the UMWA and the Employers, to administer the health and retirement program, are "representatives for the purpose of collective bargaining" within the meaning of Section 8(b)(1)(B) of the Act. If so, the UMWA violated Section 8(b)(1)(B) and 8(b)(3) of the Act, as alleged in the complaint, by insisting to a point of impasse, with strike pressure, that Amax agree to a collective-bargaining contract which includes the UMWA's health and retirement program.[49] See *Metropolitan District Council of Philadelphia, etc. (McCloskey and Company),* 137 NLRB 1583, 1584.

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49. I recognize, as the UMWA points out, that the complaint does not allege that the UMWA struck over the disputed issue but simply alleges that the UMWA "adamantly insisted" that Amax agree to the disputed proposal. However, the purpose of the strike was fully litigated in connection with this and other allegations of the complaint. Accordingly, asuming *arguendo* that the complaint does not allege conduct which constitutes restraint or coercion within the meaning of Section 8(b)(1) of the Act (but see *Sheet Metal Workers International Association Local Union No. 59,* 227 NLRB No. 90), the matter has been fully litigated.

The Board has not resolved the question for decision. Although the question was raised by the General Counsel in *Roofers Local 220 (Jones & Jones, Inc.)*, 177 NLRB 632, 649-651 (1969), the case was neither litigated nor briefed on that theory, thus, the Board did not pass on the question. See, also, *Carpenters Local 964 (Contractors Association of Rockland County)*, 181 NLRB 948, 852 (1970), where the Administrative Law Judge, in concluding that the selection of employer trustees was a nonmandatory subject of bargaining, said in *dicta* that the trustees there might be viewed as employer representatives. However, no Section 8(b)(1)(B) allegation was litigated in that case. Likewise, the decision of the Administrative Law Judge adopted without comment by the Board in *Roofers Local No. 36 (Jones & Jones, Inc.)*, 172 NLRB 2248, 2251 (1968), is not dispositive of the question presented. There, without citing precedent or setting forth a rationale, the Administrative Law Judge found that a respondent-union violated Section 8(b)(1)(B) by insisting that an employer accept trustees, not appointed by the employer, as its representative in the administration of what appears to have been a Section 302(c) trust fund. However, the comments of the Administrative Law Judge made in *Roofers Local 220, supra,* at 650, about *Roofers Local 36,* which were adopted by the Board, coupled with the lack of precedent or rationale for the *Roofers Local 36* decision, indicate that its value as a precedent is limited.

Since the Board has not resolved the question of whether the trustees involved in this case are representatives for the purposes of collective bargaining within the meaning of Section 8(b)(1)(B), I shall examine court decisions which have dealt with (1) the duties and

responsibilities of trustees who administer trusts pursuant to Section 302(c) of the LMRA and with (2) the question of whether a union's role in the administration of a Section 302(c) trust is of a different order than its duties as bargaining representative. I shall also examine Board decisions involving the question of whether trustees who administer Section 302(c) funds are agents of one or both or none of the parties that have appointed them. Finally, I shall examine the Employee Retirement Income Security Act of 1974 (ERISA) to determine its impact, if any, upon the duties and responsibilities of the trustees involved in this proceeding.

I

Paragraphs (a) and (b) of Section 302 of the LMRA make it unlawful for an employer to offer, or any representative to accept, money or other things of value. Paragraph (c) lists five exceptions to these broad prohibitions. The last one exempts payments to a trust fund established for the purpose of paying health and retirement benefits to the employees and their dependents, provided that the basis for such payments is specified in a written agreement between the Union and the Employer and that "employees and employers are equally represented in the administration" of the Funds "together with such neutral persons as the *representatives* of the employer and the *representatives* of the employees may agree upon . . . ."[50] [Emphasis added.] In

50. The term "representative" is defined in the Act as including "any individual or labor organization." See Sections 29 USC Section 142(3) and Section 152(4). Thus, the description of the trustees in Section 302(c) as "the representatives" of the parties that appoint them does not reveal whether Congress, in using this

cases involving the duties and obligations of the employer and union "representatives," the Courts have uniformly construed this portion of the statute to mean that they occupy the position of trustees who are fiduciaries rather than collective-bargaining representatives.

In *Blankenship v. Boyle,* 329 F. Supp. 1089 (D.D.C. 1971), a case involving the Funds' immediate predecessor, the District Court rejected the contention that "representatives of labor or management may properly operate the Fund, so as to give their special interests collateral advantages." The Court explained:

> . . . there is nothing in the LMRA or other federal statutes or in their legislative history which can be said to alleviate the otherwise strict common law fiduciary responsibilities of trustees appointed for employee welfare or pension funds developed by collective bargaining. Indeed, the statute under which the 1950 Fund is organized was designed expressly to isolate such welfare funds from labor — management politics. (*Id.,* at 1094.)

The Court pointed out this standard requires that any differences between the employer or union "representa-

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phraseology, intended to indicate that the trustees appointed by the unions and employers to trusts governed by 302(c) are "representatives for purposes of collective bargaining." An examination of the LMRA reveals that such a severely restricted construction of "representative" would be inapplicable to that term as it is used in other sections of the Act. This circumstance, plus the context in which "representative" is used in Section 302(c), convinces me that Congress, in describing the trustees as "representatives" of the parties that appoint them, did not mean to suggest that they are "representatives for purposes of collective bargaining" as that term is used in Section 8(b)(1)(B) of the Act. Cf. *U.S.* v. *Ryan,* 350 U.S. 299 (1956).

tives" must concern only "what is best for the beneficiaries," and not what would benefit their appointing parties:

> . . . on these matters, trustee representatives of the Union and the operators may have honest differences in judgment as to what is best for the beneficiaries. Congress anticipated such differences in enacting Section 302(c) of the LMRA, and sought to temper them by the anticipated neutrality of the third trustee. *The congressional scheme was thus designed not to alter, but to reinforce "the most fundamental duty owed by the trustee"; the duty of undivided loyalty to the beneficiaries.* 2 Scott on Trusts §170 (3d ed. 1967). This is the duty to which defendant trustees in this case must be held. (*Id.* at 1095). [Emphasis added.]

After a lengthy consideration of the case, the Court found a variety of breaches of fiduciary duty and as a part of the equitable relief granted, removed two of the trustees and enjoined the trustees. Thereafter, the UMWA requested the Court to remove the new trustee, Carey, on the ground that he would not seek "to implement the wishes and the programs of the membership." The Court declined, finding that the trustee's duty was to the beneficiaries and not to the UMWA and that unless a breach of fiduciary duty could be shown, the trustee could not be removed. *Lamp* v. *Carey,* 498 F2d 789, 794 (C.A.D.C. 1974). Subsequently, the trustee evinced an attitude and behavior which showed that he "harbors intense antagonism towards the [UMWA's] present management." *Id.* at 795. The UMWA renewed its petition for removal and the District Court removed the trustee. The Court of Appeals upheld the removal on

the ground that communication between a trustee and the party that appoints the trustee is essential to informed decisions in the best interests of the beneficiaries. The Court stated:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries. However, the District Court on March 15, 1973, made the unchallenged finding that "[c]lose collaboration with the [UMWA] is required in an atmosphere of mutual confidence to further the objectives and the effectiveness of the Fund". This places an even more stringent requirement on the actions of a Union trustee, a requirement which is here of crucial importance.
>
> Of course, this does not mean that the [UMWA] may replace its trustee merely because it dislikes him. In its Opinion and Order . . . the trial court noted that:
>
> > "If the [UMWA] desires changes in benefits or changes in the administration of the Fund, it can make its wishes known to the trustees who will consider such suggestions in a deliberate fiduciary atmosphere. . . . The very nature of the Fund, however, is such that its integrity will be undermined if the [UMWA] is given the unilateral right to remove the Union trustee whenever the dissatisfaction or differences prompted by personality or political differences prompt the [UMWA's] management to seek a change."
>
> Equally true, it does not mean that the Court can remove a Trustee whenever the [UMWA] expresses dissatisfaction. ***Lamb v. Carey*** at 793-794).

The only other court to deal definitively with the question of trustee loyalties is the Ninth Circuit Court of Appeals. In *Toensing* v. *Brown,* 528 F.2d 69 (C.A. 9, 1975), the Court followed the rationale of the *Blankenship-Lamb* decisions and held, in substance, that, although trustees may take into account the recommendations of the collective-bargaining parties if they have information "pertinent to effective administration of the Fund," those recommendations may be adopted and implemented only to the extent that they are consistent with the interests of the beneficiaries of the trust. The Court in this regard stated:

> The trustees acted properly in considering the benefit increases recommended by the collective bargaining parties. Indeed, they would have violated their fiduciary duty had they ignored information pertinent to effective administration of the Fund.
>
> * * *
>
> We wish to emphasize, however, that trustees have a duty to exercise their independent judgment in administering trust funds established under §302 of the Labor Management Relations Act. Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory. (*Id.* at 72.)

II.

In 1974, prior to the start of the contract negotiations involved in this case, Congress passed a comprehensive pension reform law called the Employee Retirement Income Security Act of 1974 (ERISA). The UMWA health and retirement funds are regulated by

the provisions of ERISA and, as previously described, the status of the Funds' trustees is defined as that of fiduciaries within the meaning of ERISA. ERISA requires that the Funds' trustees act solely for the benefit of the Funds' participants (a potential beneficiary) and beneficiaries and subjects derelict trustees to civil liability and removal. Section 404(a)(1), 29 U.S.C. Section 1104(a)(1) provides:

> Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;

Specifying this duty, Section 406(b)(2), 29 U.S.C. Section 1106(b)(2) requires:

> (B) A fiduciary with respect to a plan shall not—
>
> * * *
>
> (2) in his individual or in any other capacity, act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries . . . .

The purpose of this section was explained by the Joint House Conference Report in these terms:

> This prevents a fiduciary from being put into a position where he has dual loyalties, and therefore he cannot act exclusively for the benefit of a plan's participants and beneficiaries. H.R. Rep. No. 93, 93d Cong., 2d Sess., 1280.

Also, a trustee who represents the interests of his principal, in violation of his duty to trust beneficiaries, is personally liable for damages and subject to removal under Section 409(a) of ERISA, 29 U.S.C. Section 1109(a). Furthermore, under Section 405 of ERISA, 29 U.S.C. Section 1105, a trustee has a positive duty to prevent his counterpart from acting in the interests of his own principal.

In view of the foregoing provisions of ERISA, the following comment appearing in the UMWA's post-hearing brief is singularly appropriate:

> Trustees subject to ERISA are the antithesis of collective bargaining representatives. Collective bargaining representatives are required to represent the interests of their principals. Trustees under ERISA are severely penalized if they do. Collective bargaining representatives are penalized if they interfere when their counterparts act in behalf of their own principles. Trustees under ERISA breach their duty if they do not interfere. No greater dichotomy could be imagined.

III.

The Funds' trustees' role as fiduciaries, governed by the stringent regulations imposed by ERISA, convinces me they are not representatives for purposes of collective bargaining. I recognize that, in the administration of the Funds, the trustees possess the authority to de-

cide matters which are of vital importance to the employees, the Union and the employers. I also recognize that in resolving these matters the trustees may represent the interest of the parties who appoint them, to the extent that this can be done without compromising their fiduciary responsibility to the Funds and its beneficiaries. Stated another way, the trustees may take into account recommendations of the collective-bargaining parties insofar as the recommendations include information "pertinent to the effective administration of the Fund[s]," but these recommendations may be adopted and implemented only to the extent they are consistent with the fiduciary obligation the trustees owe the beneficiaries of the Funds. Therein lies the reason why the trustee appointed by the UMWA and the one appointed by the employers are not representatives for purposes of collective bargaining. Their fiduciary status makes it legally impossible for them to represent their principals for purposes of collective bargaining as contemplated in Section 8(b) (1) (B) of the Act. A primary attribute of individuals who act as bargaining representatives is that they owe undivided allegiance to the union or employer that appoints them and are bound to follow the instructions and act in the interest of their principals. The trustees involved in this case, however, are required by law and by the terms of the UMWA's proposed collective-bargaining agreement to act exclusively in the interest of the Funds' beneficiaries regardless of the consequences to the UMWA or the employers. The trustees are required to consider the recommendations of the employers and the UMWA in "a deliberate fiduciary atmosphere," not in the give-and-take atmosphere of the bargaining table. Moreover, the Funds' trustees differ in other crucial respects from collective-bargaining repre-

sentatives because of the fiduciary duty they owe to the Funds' beneficiaries. The trustees may be removed from their position as "representatives" of the parties only for a breach of their fiduciary duties, rather than because their principals are dissatisfied with their representation, and they are paid out of the Funds' assets rather than by the parties that appointed them.

Based on the foregoing, I conclude that the Funds' management trustee is not a representative for purposes of collective bargaining as that term is used in Section 8(b)(1)(B) of the Act. This conclusion is supported by Court and Board decisions which have implicitly recognized that trustees who administer trust funds, like the ones involved in this case, do not act as representatives for purposes of collective bargaining.

In *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971), the Supreme Court indicated that "the Union's role in the administration of the fund [referring to a trust fund created under Section 302(c)] is of a far different order from its duties as collective bargaining agent."

In *Miniard* v. *Lewis*, 387 F.2d 864 (C.A.D.C. 1967) cert denied 393 U.S. 873, an employee alleged that the trustees of the predecessor to the Funds involved in this case had breached their duty of fair representation, imposed by the Act upon unions, by excluding him from the Funds' coverage. See *Vaca* v. *Sipes*, 385 U.S. 895 (1967). The Court held there was no such duty:

> The allegation is founded on a union's duty to represent, equally and without discrimination, the interest of all employees in the bargaining unit. Even though the Fund here resulted from bargain-

ing between the employer and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the Trustees' duties are those of fiduciaries because as *Trustees* they perform separate functions and do not act as representatives of either employers or the union. (*Id.* at 865, n. 5.) [Emphasis in the original.]

In *N.L.R.B.* v. *Carpenters' Local 1913 (Fixtures Unlimited),* 531 F.2d 424 (C.A. 9), the Court ruled that the trustees of a qualifying fund were not agents of the collective-bargaining parties for the purpose of remedying violations of the Act. There, the Board, finding that the trustees were agents of the respondent-union, ordered the trust to accept payment and administer the proceeds of a backpay order.[51] The Court held that the trust agreement, on its face, established on such agency relationship: "An agent acts for and on behalf of his principal and subject to his control. A trustee acts for the benefit of the beneficiaries of the trust. . . ." *N.L.R.B.* v. *Carpenters' Local 1913, supra,* at 426. The Court ultimately affirmed the Board's order, but on the ground that acceptance by the trustees of the backpay contributions from the respondent-union, on behalf of the discriminatee, would not be inconsistent with their fiduciary duty and otherwise would not violate Section 302 of the LMRA. *Id.* at 426.

The courts have also held that Section 301 of the Act, which confers jurisdiction in suits for violations of collective-bargaining agreements, does not confer such

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51. The Board found that the trustees, including the employer-appointed one, were agents of the respondent-union. *United Brotherhood of Carpenters and Joiners of America Local No. 1913, AFL-CIO, et al. (Fixtures Unlimited,* 213 NLRB 363, note 1.

jurisdiction in cases involving allegations that trustees have breached a trust agreement. See *Bowers* v. *Moreno,* 520 F.2d 843, 845 (C.A. 1) ("The Court had no jurisdiction over employer trustees under Section 301 of the LMRA of 1947, since they were not, in this context representatives of the employers"). See, also, *Beam* v. *International Organization of Masters, Mates and Pilots, et al.,* 511 F.2d 975, 978 (C.A. 2).

Lastly, the Board in cases involving the administration of trust funds has consistently found that "the trustees of a trust fund which has been provided for by the collective bargaining agreement are agents of each of the parties to such agreement." *L & M Carpet Contractors, Inc.,* 218 NLRB 802, n. 1, citing *Local 80, Sheet Metal Workers International Association, AFL-CIO, et al. (Turner-Brooks, Inc.),* 161 NLRB 229, 234. See, also, *Jacobs Transfer, Inc.,* 227 NLRB No. 181, slip opinion at pages 4-5, and *United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO, et al. (Fixtures Unlimited),* 213 NLRB 363 note 1, modified on this point 531 F.2d 424 (C.A. 9). Obviously, a person who acts as a representative for the purposes of collective bargaining cannot act as an agent for both the employer and the union, hence, implicit in these Board decisions is the recognition that in the administration of a trust fund created by a collective-bargaining agreement, the trustees are not representatives for purposes of collective bargaining.[52]

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52. The cited cases involve the conduct of trustees covered by provisions in a collective-bargaining agreement. The instant situation is no different. The Funds' provisions are contained in various benefit and pension plans and trusts, all of which are specifically incorporated into the collective-bargaining agreement and made a part thereof.

Based on the foregoing, I shall recommend the dismissal of the portion of the complaint alleging that Respondents violated Section 8(b) (1) (B) and 8(b) (3) in that they "adamantly insisted on the inclusion of Pension and Health and Welfare Trust Provisions, by the terms of which the trustees . . . would not be selected by the employer."

b. *The Joint Western Surface Mining Industry Training Committee*

The complaint alleges that the Respondents violated Section 8(b) (1) (B) and 8(b) (3) of the Act by adamantly insisting that Amax agree to that part of the UMWA's contract proposal creating a Joint Western Surface Industry Training Committee, herein called the Western Industry Training Committee, which the complaint further alleges to be a nonmandatory subject of bargaining providing for collective-bargaining representatives not selected by Amax. The training provision challenged by the complaint was first proposed in the UMWA's January 27, 1965 contract proposal and reads as follows:

ARTICLE XV
TRAINING

Section (a) Priority

The parties agree that the establishment of effective training programs for Employees is essential to safe and efficient production of coal. Toward that end there shall be established a Joint Western Surface Mining Industry Training Committee which shall consist of 3 representatives appointed by the United Mine Workers of America and 3 representatives of the industry, appointed by the Employers.

This committee shall meet primarily for the purpose of fostering and promoting the advancement of effective training in the industry.

The Joint Western Surface Mining Industry Committee will give special attention to the problems of Employers operating three (3) or fewer mines and aid in devising training programs for these companies that will permit them to institute effective training programs without imposing undue hardships.

The International Union and the Employers shall each assign a trained representative to devote full time as long as needed to assist the Joint Western Surface Mining Industry Training Committee and the Employers signatory hereto in developing and implementing the various training programs provided for herein.

The remainder of Article XV, section (b) through (f), sets forth the "various training programs" referred to in section (a), lists minimum standards for each program and specifically provides that each program "shall be developed by [Amax]."

The Western Industry Training Committee is also referred to in Article III, section (c)(2), which deals with health and safety matters and which was first included in the UMWA's January 27, 1965 contract proposal. It reads as follows:

Appendix A.

ARTICLE III

HEALTH AND SAFETY

Section (c) Mine Health and Safety Committee

* * *

(2) The Union and Employer shall jointly establish and fund a course of health and safety training for members of the Mine Health and Safety Committee, which is designed to improve health and safety knowledge and skills. The Mine Health and Safety Committee shall participate in and shall be paid at their regular rates of pay by the Employer for attendance at training sessions. The training program shall be established by the Joint Western Surface Mining Industry Training Committee.

* * *

The remainder of section (1) of Article III describes the Mine Health and Safety Committee and describes its functions. In substance it provides that Local 1854 will establish such a committee at the Belle Ayr Mine composed of miners employed at the mine who shall inspect the mine for unsafe working conditions, make findings and recommendations to Amax about such conditions, and hold monthly meetings with management to discuss health and safety problems.

The parties did not adduce evidence describing the manner in which the Western Industry Training Committee functions. Thomas Betell, who is a staff representative for the Joint Industry Training Committee established pursuant to the training provisions included in the National Bituminous Coal Wage Agreement of 1974, testified on behalf of the UMWA about the manner in which that committee functions. However, the train-

ing committee involved in this case, the Western Industry Training Committee, is different than the Joint Industry Training Committee, described by Betell, and its existence is based upon the provisions of a different collective-bargaining agreement. Indeed, Betell testified that his work did not involve him with the Western Industry Training Committee and admitted he was not even sure whether this committee had been established. Under these circumstances, Betell was not competent to testify about the Western Industry Training Committee, and I have not considered his testimony.

The UMWA's contract proposal concerning the Western Industry Training Committee, as set forth in Article XV(a) of the contract as describer *supra,* remained a part of the UMWA contract proposal from January 27, 1975, until July 1, 1975, when it was changed to read: "The parties agree that the establishment of effective training programs for employees is essential to safe efficient production of coal. The International Union and Amax shall each assign a trained representative in developing and implementing the various training programs provided for herein." But, Article III(c)(2) of the UMWA contract proposal, as described *supra,* remained unchanged throughout the negotiations.[53] In sum, for a period of 5 months the UMWA engaged in a strike for a contract which included the disputed provi-

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53. The complaint does not contest the UMWA's conduct connected with Article III(c)(2), rather it specifically challenges Article II(a). Under the circumstances, I have not considered whether the UMWA's conduct in connection with Article III(c)(2) was illegal but have considered the language of this article only insofar as it is helpful in deciding whether the UMWA's conduct in connection with Article II(a) was impermissible.

sion, Article II(a), involved herein. When the subject of the Western Industry Training Committee was first brought up by the UMWA at the meeting of January 6, 1975,[54] Amax's negotiators stated the Company wanted no part of this committee and indicated it would not agree to the establishment of a committee whose employer representatives were not selected by Amax. During the remainder of the negotiations Amax never altered this position and in its several contract proposals between January 27 and July 1, 1975, refused to accept such a committee as proposed by the UMWA.

I am of the view, even assuming the UMWA bargained to impasse and exercised restraint or coercion in connection with its demand that Amax sign a contract incorporating the disputed Western Industry Training Committee,[55] the evidence is insufficient to establish a violation of Section 8(b)(1)(B) and 8(b)(3) as alleged in the complaint.

The provision—Article II(a)—creating the Western Industry Training Committee, insofar as it establishes employees' training programs, is acknowledged by the parties to this proceeding to be a mandatory subject of bargaining, thus, the UMWA would not violate the Act

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54. The subject of the Western Industry Training Committee was discussed at the meeting of January 6 even though the provision for the committee did not appear in the UMWA's contract proposal until January 27, 1975.

55. For the reasons set forth, *supra,* in connection with the UMWA's contractual health and retirement proposal, I reject the UMWA's defense that the 8(b)(1)(B) allegation should be dismissed because the complaint does not plead impermissible "restraint or coercion."

merely by insisting to an impasse that Amax agree to a contract which incorporated this provision. The UMWA loses its right to insist to an impasse about this matter only if, as alleged in the complaint, the presence of management members on the Western Industry Training Committee limits Amax "in the selection of [its] representatives for the purposes of collective bargaining," for if it does, insistance to a bargaining impasse upon the inclusion of this provision would constitute a refusal to bargain within the meaning of Section 8(b)(3) of the Act, and striking to obtain Amax's agreement to the inclusion of the provision would constitute a violation of Section 8(b)(1)(B) of the Act. *Metropolitan District Council of Philadelphia, etc. (McCloskey Co.),* 137 NLRB 1583, 1584. The issue, therefore, is whether the management members of the Western Industry Training Committee, who are selected by employers other than Amax, are representatives for the purposes of collective bargaining within the meaning of Section 8(b)(1)(B) of the Act. I am persuaded they are not representatives for purposes of collective bargaining for the following reasons.

The Western Industry Training Committee, as described, *supra,* in Article II(a) of the UMWA contract proposal, was created to encourage and promote the advancement of training programs for the employees employed in the western surface coal mines, particularly for the smaller employers, and to assist the employers to develop and implement the several training programs set forth in section (b) through (f) of Article II. These sections of Article II enumerate a minimal standard for the various training programs and specifically provide that each program "shall be developed by [Amax]." In other words, the committee is not engaged in collective-

bargaining negotiations or the administration of the collective-bargaining agreement, rather its function is to advise Amax and other employers about employees' training programs. The employers are free, however, to disregard this advice. This is indicated by the fact that Article II(a) is worded in terms of the committee giving aid or assistance to the employers and provides that each employer shall develop its own program.[56] Under these circumstances, I do not view the UMWA's contractual demand involved herein as one involving an employer's selection of his representative for the purposes of collective bargaining, for the function of this committee is not to negotiate or administer a collective-bargaining agreement, but is more in the nature of a panel of knowledgeable persons empowered to give advice on only one type of problem, which advice the Employer does not have to accept.[57] It is in this signifiant respect

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56. In this regard Article III(c)(2) is ambiguous. It starts by stating that "The Union and [Amax] shall jointly establish . . . a course of health and safety training for members of the Mine Health and Safety Committee," but ends stating that this committee's training program "will be established by the [Western Industry Training Committee]." The ambiguity of Article III(c)(2), when viewed in the light of Article II(a) wherein the Western Industry Training Committee was created and granted authority only to act in an advisory capacity, leads me to conclude that it is unrealistic to interpret Article III(c)(2) as giving more power to the committee than it was endowed with by the article which establishes its authority. In any event, as noted previously, the complaint does not place into issue the legality of Article III(c)(2), only Article II(a).

57. The fact that the committee is established to advise about only one particular problem—the development of training programs—provides further support for the inference that the management members are chosen to provide information, not advocacy.

that prior Board cases cited by the General Counsel and the Charging Party[58] are distinguishable from the instant situation.

Based on the foregoing, I shall recommend that the complaint be dismissed insofar as it alleges that, in violation of Section 8(b)(1)(B) and 8(b)(3), Respondents have "adamantly insisted on the inclusion of the following training clause [Article XV, Section (a)] which is a nonmandatory subject of bargaining and provides for representatives not selected by the Employer."

c. *The district agreements*

The enabling clause of the UMWA's contract proposal, Article I, among other things, includes a provision dealing with district agreements which the UMWA continued to propose until its contract proposal of November 14, 1975. This proposal in substance states that any collective-bargaining agreement entered into between the parties would carry forward and preserve the several district agreements "executed between the UMWA and the various employers," subject to the terms of the parties' collective-bargaining agreement. Amax had never entered into any such district agreement covering the Belle Ayr Mine.

The Charging Party contends that this contract proposal encompasses a nonmandatory subject of bargaining inasmuch as it requires Amax to accept the terms of agreements negotiated by other employers. In other words, the evidence establishes the Union bar-

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58. *Federated Employers of Nevada,* 135 NLRB 462, 470-471; *Metropolitan District Council of Philadelphia, etc. (McCloskey & Co.),* 137 NLRB 1583; *Local 264, Laborers (D & G Construction Co.),* 216 NLRB 40.

gained to impasse over a contract proposal which, if accepted, would in effect have required Amax to designate another employer as its collective-bargaining representative. I disagree because the record establishes that the Union made it perfectly clear to Amax that it was not the intent of this language to require Amax to abide by agreements negotiated by other employers. On February 25, 1975, the first negotiation meeting at which the parties apparently discussed the meaning of the disputed provision, Edelman, at the request of Amax's negotiator, Cairns, furnished Amax with copies of the several district agreements and told Cairns that, since Amax was not a party to any of these agreements, they would have no effect on Amax.[59] Thereafter, at the next bargaining session, held on March 7, 1975, Edelman in effect repeated that the UMWA, in proposing the district agreement language, did not intend that Amax be required to abide by any one of these agreements and indicated that the UMWA was willing to reduce this to writing in the form of a memorandum of understanding.

Based on the foregoing, I am not persuaded that the record preponderates in favor of a finding that the UMWA offered the district agreements' language in the enabling clause with the intent of having Amax abide by the terms of agreements negotiated by other employers. Accordingly, insofar as the complaint alleges that

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59. This apparently did not come as any surprise to Amax for the district agreement language was included in its recently expired contract covering the Belle Ayr Mine, and there is no evidence that during the term of that agreement the UMWA took the position that the Belle Ayr Mine was covered by any one of the district agreements.

the Respondents violated Section 8(b)(3) of the Act by bargaining to an impasse over the aforesaid district agreements' language, I shall recommend that it be dismissed.

4. The contract proposals which allegedly contain nonmandatory bargaining subjects

a. *The "coal lands clause" and "enabling clause"*

The complaint placed in issue the question of whether Respondents violated Section 8(b)(3) of the Act by adamantly insisting that Amax accept a contract which required it to recognize the UMWA as the exclusive collective-bargaining representative of the miners employed by Amax in its western mines other than the Belle Ayr Mine (paragraph 17(d) and (g) of the amended consolidated complaint).

Article I, entitled "Enabling Clause" and section (f) of Article II, entitled "Application of this Contract to the Employer's Coal Lands," which were included in the UMWA's first contract proposal of January 6, 1975, in pertinent part, read as follows:

> *Article I, Enabling Clause*
> This agreement . . . covers the sub-bituminous coal or lignite mines owned or operated by [Amax].
>
> *Article II*
> (f) . . . this agreement covers the operation of all the coal lands, coal producing, and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production or use.

Appendix A.

These proposals remained unchanged, in pertinent part, until the UMWA's contract proposal of July 1, 1975, which added a proviso to the above-described "Enabling Clause" which required that the UMWA must be "the bargaining representative of the employees of the Employer at such mines," and added a similar proviso to the above-described "coal lands clause" which required that "the Union establishes its status as the representative of a majority of the employees at such mine or facility." The next and final change in these proposals was made by the UMWA in its contract proposal of November 14, 1975, at which time the UMWA notified Amax that the "coal lands clause," to which Amax took strong objection has been deleted in its entirety." The above-described "Enabling Clause" was changed at this time to read:

> This agreement covers [Amax's] Belle Ayr Mine and all other western sub-bituminous and lignite mines, coal lands, coal producing and coal preparation facilities, owned or operated or held under lease by it, or by any subsidiary or affiliate at the date of this agreement, or which may hereinafter (during the term of this agreement) be put into production or use on the leases attached hereto as Addendum A.[60]

In connection with this particular proposal, the UMWA in its letter of explanation to Amax stated:

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60. The reference to "the leases attached hereto as Addendum A," as explained in the UMWA's letter of explanation which accompanied the November 14, 1975, contract proposal, are those leases which establish the Belle Ayr Mine.

> . . . the UMWA has agreed to the concept that the proposed Agreement should pertain to the Belle Ayr Mine only. However, the Union feels very strongly that the Belle Ayr Mine comprises any mining which will be done on the present leases held by Amax in Campbell County, Wyoming [the site of the Belle Ayr Mine]. Therefore, the language of Article I has been restructured to insure that although the agreement will apply only to the Belle Ayr Mine, the UMWA will obtain jurisdiction of all new operations on those leases.

Amax, as indicated above, voiced strong objections to the above-described "coal lands clause" and "enabling clause." During the first meeting of the parties' bargaining teams held on January 6, 1975, Amax's negotiators objected to the UMWA contract proposal insofar as it covered Amax's faciilties other than the Belle Ayr Mine. On January 9, 1975, this objection was reduced into writing by Payne, Amax's chief negotiator, in a hand-delivered letter to Yablonski, the UMWA's spokesperson. Yablonski answered the same day, by letter, stating: "Your assertion that the UMWA has attempted to bargain for Amax operations other than Belle Ayr is plainly without foundation. The standard UMWA accretion clauses—known as 'Application of contract to coal lands'—merely commits an employer who agrees to it to apply the terms of that agreement to any new mining operation which may be developed during the life of the agreement if the UMWA is either recognized or certified as the collective bargaining agent of that operation." Thereafter, during one of the negotiating meetings held the week of February 13, 1975, UMWA negotiator Edelman informed Amaxx's negotiators that the

UMWA was willing to execute a memorandum of understanding stating that its proposed "coal lands clause" would only apply in those situations where the UMWA became the duly recognized bargaining representative of the mine employees employed at the new operation.

During the period from January 6, 1975, to the UMWA's November 14, 1975 contract proposal, Amax objected to the "coal lands clause" and the "enabling clause." It voiced its objections directly by stating them at the negotiation meetings and indirectly by offering contract proposals which completely omitted the disputed provisions. The UMWA for a period of over 11 months, January 6, 1975 until November 14, 1975, demanded that the Company sign a contract which included the disputed proposals, and on January 12, 1975, struck in support of a contract which included them. I find that by the time of its contract proposal of February 27, 1975, and possibly as early as January 12, 1975, the UMWA had bargained to a point of impasse with Amax over the disputed provisions and this impasse continued until the UMWA advanced its November 14, 1975 contract proposal.[61] I recognize the UMWA did not specifically state it was conditioning the signing of a complete agreement upon the inclusion of the disputed clauses. However, as I have found previously, the record establishes that the UMWA for a period of at least 8

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61. Amax always made it clear that its objection to the disputed language was based on the requirement that Amax would have to apply the terms of the collective-bargaining agreement to facilities in the west which it operated other than the Belle Ayr Mine. In these circumstances, the UMWA's modification of the disputed language made in its July 1, 1975 contract proposal did not break the bargaining impasse.

months, in the face of Amax's continued opposition, insisted to the point of impasse that Amax accept the disputed contract proposals. This continued insistence, against the opposition of Amax, amounts to a refusal to bargain as to mandatory subjects of bargaining, if the disputed contract provisions are nonmandatory subjects of bargaining. *District 50, United Mine Workers of America, etc. (Central Soya Company, Inc.)*, 142 NLRB 930, 939.[62]

The essential question presented for decision, whether the above-described "enabling clause" and "coal lands clause" constitute mandatory or nonmandatory bargaining subjects, is one of first impression. These clauses, which are sometimes referred to as "after acquired" or "additional facility" clauses are common to collective-bargaining agreements and the Board has held they are not proscribed by the Act but are valid contractual provisions, regardless of whether they specifically provide that the employees of the "after acquired" or "additional faciilty" must designate the union as their exclusive bargaining representative. *Houston Division of the Kroger Co.*, 219 NLRB 388. The Board has not decided whether such clauses are mandatory subjects of bargaining. I am of the opinion, for the reasons

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62. Also see *National Fresh Fruit & Vegetable Company, et al.*, 227 NLRB No. 293, where the Board enunciated the controlling factors used to determine whether one party to contract negotiations has unlawfully insisted to the point of impasse that the other party accept a nonmandatory bargaining subject. Throughout this Decision, in evaluating the evidence to determine whether the UMWA bargained to a point of impermissible impasse, over its several alleged nonmandatory and illegal contract proposals, I have been guided by the principles enunciated in the aforesaid decision.

set forth herein, that these clauses are nonmandatory subjects of bargaining.

Unlike wages, hours and other terms and conditions of employment, questions concerning the scope of a certified bargaining unit are not mandatory subjects of bargaining. *Hess Oil & Chemical Corp.* v. *N.L.R.B.*, 415 F.2d 440, 444-445 (C.A. 5). Under the statutory scheme, the resolution of such unit disputes does not normally occur within the framework of collective bargaining but, rather, is governed by Section 9 of the Act, which confers upon the Board exclusive authority to resolve such disputes through hearing and election procedures. Thus, it is unlawful for an employer or union to insist that employees included in a certified or recognized unit be excluded from an agreement's coverage, or to insist that the agreement set working conditions for employees who are not in the unit. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 666-667; *N.L.R.B.* v. *South Atlantic Longshoremen's Ass'n*, 443 F.2d 218, 220 (C.A. 5); *Douds* v. *International Longshoremen's Ass'n*, 241 F.2d 278, 282-283 (C.A. 2), and *Hess Oil & Chemical Corp.* v. *N.L.R.B.*, *supra*, 415 F.2d at 444-445. An employer's bargaining obligation "extends only to the 'terms and conditions of employment' of the employer's employees' in the 'unit appropriate for such purposes' that the Union represents." *Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 164. As the Second Circuit Court of Appeals explained in the *Douds* case:

> The process of change not permitted by the Act is one that denies the Board . . . ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate

> bargaining unit is, one party over the objection of the other demands a change in that unit. Such a demand interferes with the required bargaining 'with respect to rates of pay, wages, hours and conditions of employment' in a manner excluded by the Act. It is thus a refusal to bargain in good faith within the meaning of Section 8(b)(3). (241 F.2d at 282-283.)

In short, while an employer and a union may agree to merge separate bargaining units for the purpose of negotiations, such enlargement of the bargaining unit is not a mandatory subject of bargaining. Neither party may insist to the point of impasse that the negotiations in the certified unit be extended to other units.

The record here establishes that during the instant negotiations the UMWA pursued to a point of impasse in bargaining, with strike pressure, an objective which necessarily required Amax to conduct negotiations on a basis broader than the certified unit. The necessary effect of the disputed "coal lands clause" and "enabling clause," if accepted by Amax, was to force its negotiators to bargain about the wages and other terms and conditions of employment of employees employed at facilities, other than the Belle Ayr Mine, which Amax might operate in the west during the term of the agreement, thus, in effect merging the Belle Ayr Mine into a company-wide bargaining unit.[63] This conduct, for

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63. The UMWA takes the position that, "although there are apparent similarities between the coal lands clause and multi-unit bargaining," the record does not establish "multi-unit bargaining" was an object of the disputed clauses. I disagree. I can think of no clearer expression of a demand for an employer to engage in "multi-unit bargaining" as when, as here, a union de-

the reasons given previously, contravenes the obligation to bargain in good faith imposed by the Act.

The UMWA argues, however, that the above-described principles of law should not be applied here because the disputed clauses seek "to preserve the jobs and work standards for the Belle Ayr miners by removing the economic incentive for Amax to develop other mines (with substandard nonunion wages, hours and other terms and conditions of employment) at the expense of the Belle Ayr miners," hence, since the disputed clauses vitally affect the unit employees the clauses are mandatory subjects of bargaining, citing, *Local 24 Teamsters* v. *Oliver,* 358 U.S. 283 (1958), and *Chemical Workers, Local 1.* v. *Pittsburgh Plate Glass,* 404 U.S. 157, 179 (1971). In further support of its position, the UMWA points out that "a union may adopt a uniform wage policy and seek vigorously to implement it," *United Mine Workers* v. *Pennington,* 381 U.S. 657, 665, and that the disputed clauses also "seek to set the stage for coalition bargaining," which type of bargaining has been recognized "as a lawful and legitimate union objective," citing, *AFL-CIO Joint Negotiating Committee for Phelps Dodge* v. *N.L.R.B.,* 459 F.2d 374 (C.A. 3), and *U.S. Pipe and Foundry* v. *N.L.R.B.,* 298 F.2d 873 (C.A. 5).

Concededly, the employees and the bargaining representative at the Belle Ayr Mine may have an interest in consolidating the Belle Ayr contract negotiations with those of other western mines that Amax will

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mands that the employer sign an agreement covering one bargaining unit which contains a clause stating that "this agreement covers" the employer's other bargaining units.

eventually operate. But there is also a competing public interest in avoiding industrial strife and disruption to the process of collective bargaining which is likely to flow if the UMWA is permitted to press its own interests in obtaining agreement in one bargaining unit over the terms and conditions of employment to be applicable generally to other separate bargaining units not even yet in existence. In this situation the public interest embodied in the statute far outweights the UMWA's interest. The Act, as described *supra,* mandates that issues relating to the nature and size of bargaining units are not to be determined by economic pressures, but rather by the orderly and peaceful procedures provided for in the Act. See *Douds* v. *International Longshoremen's Ass'n.* 241 F.2d 278, 282-283 (C.A. 2). This does not mean that the UMWA must entirely foresake all efforts toward obtaining uniformity in working conditions between the Belle Ayr Mine and other western mines Amax may operate, or that all forms of mutual aid or support between these different bargaining units are unlawful. The cases cited by the UMWA, *supra,* clearly demonstrate this much. But the UMWA cannot justify its conduct here in terms of those cases. For what was at issue in those cases simply does not involve the sort of collision with the paramount statutory policy of preserving the integrity of a bargaining unit from disruptive attack. Thus, the decision of the Supreme Court in *Pennington* demonstrates that the goal of "uniformity of labor standards" is not a sacrosanct absolute which can be pursued without regard for the more important public policies reflected in legislation. Although in *Pennington* the conflict was with a prohibition of the Sherman Antitrust Act, the Court took pains to point out, in

terms meaningful to this case, that the national labor policy also places restrictions on a union's pursuit of uniformity:

> . . . There is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions for other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quiet different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being straitjacketed by some prior agreement with favored employers. (381 U.S. at 666.)

Likewise, the *Oliver* case did not involve the juxtaposition of a union's interest in uniformity of working conditions with the integrity of a recognized or certified bargaining unit. Indeed, the Supreme Court in subsequently reaffirming that *Oliver* stood for the proposition that when the terms of employment of persons outside of a bargaining unit "vitally affects" the terms and conditions of employment of unit employees, they are mandatory subjects of bargaining, was careful to point out that "this is not to say that application of *Oliver* . . . turns only on the impact of a third party [the extra-unit employees] matter on employee interests. Other considerations . . . may be equally important." *Chemical Workers, Local 1* v. *Pittsburgh Plate Glass,* 404 U.S. 157, 179, note 19.

The other cases cited by the UMWA similarly turn on principles which cannot be extended to the different

circumstances presented here. The facts in this proceeding are significantly distinguishable from those in the *Phelps Dodge* case in which the Court set aside the Board's finding of an 8(b)(3) violation. In that case the union involved sought common contract expiration dates and simultaneous settlements of all contracts. But separate negotiations were conducted at each company's unit and no bargaining was conducted at any unit with regard to employment conditions at other locals. The only case relied on by the UMWA which might be regarded as creating an exception to the general rule that proposals to expand the scope of the bargaining unit are not mandatory subjects of bargaining is the *U.S. Pipe and Foundry* case. There, the issue, as the Court stated it, was "whether by prearrangement among themselves, each of three unions, certified representatives of three separate plant bargaining units, simultaneously negotiating separate contracts with the same employer, may insist as a condition to its agreement that all three contracts under negotiations shall expire on a common date." 298 F.2d at 877. In holding that the unions might legitimately insist on a common expiration date, the Court pointed out that "[w]ithout a common expiration date, any union striking for a new contract on a different date might have to 'bail with a sieve' while the employer shifted its production activities to the other plant or plants." 298 F.2d at 877. However, it is plain that the Court was dealing only with a request for a common expiration date and nothing more. The Court could well have viewed the request "realistically" (298 F.2d at 877) as representing merely an "*apparent*" rather than a "*real*" expansion of the scope of the bargaining unit (298 F.2d at 878). For there was no showing, such as

is present in the instant case, that the unions involved were demanding agreement in one bargaining unit of terms and conditions of employment to be applicable generally to other bargaining units. Indeed, as the Court said, "a common expiration date for all three contracts vitally affects the ability of *each* union *separately* to bargain [emphasis added] (298 F.2d at 878)."

Based on the foregoing, I find that during the contract negotiations for the Belle Ayr Mine, the Respondents, over the objections of Amax, insisted to a point of impasse that Amax agree to contractual provisions which are nonmandatory subjects of bargaining insofar as, if accepted, they would require Amax to bargain with Respondents about the wages and other terms and conditions of employment of employees employed in bargaining units other than the Belle Ayr Mine. Accordingly, Respondents violated Section 8(b)(3) of the Act as alleged in the amended complaint.

On November 14, 1975, as described in detail *supra,* the UMWA withdrew the "coal lands clause" from the bargaining table and with respect to the disputed portion of the "enabling clause" submitted new language. In this last regard, the UMWA's letter of explanation, set out in full *supra,* notified Amax that the Union had agreed "to the concept that the proposed agreement should pertain to the Belle Ayr Mine only," but that the new language incorporated into the "enabling clause" was drafted so that the UMWA would have jurisdiction over all operations upon the leases which establish the Belle Ayr Mine. The "enabling clause," as reworded on November 14, 1975, is set out in full, *supra,* and can be reasonably construed in this manner. In any event, it is sufficiently ambiguous so as to preclude any finding that

its acceptance by the Company would have obligated the Company to apply the collective-bargaining agreement to facilities which were not part of the Belle Ayr Mine. In other words, the record does not establish that the "enabling clause," as modified by the contract proposal of November 14, extended the proposed contract to other bargaining units. Accordingly, I shall recommend dismissal of the part of the amended consolidated complaint which alleges that Respondents violated Section 8(b)(3) by adamantly insisting that Amax accept this provision.

b. *The dismissal of litigation proposal*

The complaint in substance alleges that Respondents conditioned the reaching of a collective-bargaining agreement upon Amax's withdrawal of the lawsuits and unfair labor practice charges it had filed against Respondents, thus, violating Section 8(b)(3) of the Act. The pertinent facts can be briefly summarized.

The matter of the withdrawal of litigation was brought up for the first time on April 10, 1975, when the UMWA telegraphed Amax rejecting its March 14, 1975 contract offer and notified Amax that the UMWA's last contract proposal remained unchanged except for three new proposals, one of which was the "dismissal of all litigation." On July 1, 1975, the UMWA submitted a new contract proposal with an attached memorandum of understanding which incorporated into the agreement several items, one of which was entitled "Dismissal of Litigation" and reads:

> As a further consideration for the execution of the Agreement and this memorandum of understanding, it is agreed that both parties hereto will promptly

> seek the dismissal of all litigation arising from their dispute at the Belle Ayr Mine, which is pending before any state or federal court or before the National Labor Relations Board.

The UMWA's next and last contract proposal submitted on November 14, 1975, did not include a memorandum of understanding, nor was the "Dismissal of Litigation" provision included in the body of the agreement. However, the UMWA's written explanation which accompanied the proposal to Amax, among other things, states "we do not withdraw our proposal that all litigation generated by the dispute at the Belle Ayr Mine be dismissed."

During the course of the negotiations involved herein, the proposal that the parties dismiss or withdraw all litigation was mentioned or discussed only once, at the bargaining sessions which took place August 7-8, 1975. Yablonski for the UMWA, at that time, reminded Amax's negotiators there had been no discussion about the UMWA's proposals involving the reinstatement of strikers and the dismissal of litigation. In reply, Amax's negotiators stated the Company felt that since the parties were apart on so many issues of substance, it would be premature to discuss those questions. Yablonski did not press the matter any further.[64] In other words,

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64. I have considered and rejected Cairns' testimony, given on cross-examination, that "the union . . . did insist that we drop our litigation as the price of a contract." Cairns did not place this alleged statement of the Union's position in its context nor did he testify whether it was a written or verbal statement and, if the latter, when it was made and by whom. He did not, when he testified about this matter, impress me as a trustworthy witness.

there is no evidence that Amax objected to the UMWA's "Dismissal of Litigation" proposal.

The UMWA's contract proposal that Amax withdraw the lawsuits and unfair labor practice charges filed against the UMWA is a nonmandatory subject of bargaining. *N.L.R.B.* v. *Local 964 United Brotherhood of Carpenters and Joiners of America,* 447 F.2d 643, 646 (C.A. 2). The Act permits either of the parties, in collective bargaining, to propose and negotiate about nonmandatory subjects of bargaining, but it forbids them to insist to impasse upon such matters. *N.L.R.B.* v. *Wooster Division of Borg-Warner,* 356 U.S. 342. The crucial issue presented here for decision is whether the UMWA's treatment of its "Dismissal of Litigation" proposal—a nonmandatory subject of bargaining—should be characterized as a "proposal" or an "insistence to impasse." I am persuaded the record does not establish that the UMWA insisted to impasse on this nonmandatory subject of bargaining. Amax never voiced any kind of an objection—let alone an explicit and unequivocal objection—to the proposal. *Union Carbide Corporation,* 165 NLRB 254, enf'd, 405 F.2d 1111 (C.A.D.C.), and, generally, see *National Fresh Fruit & Vegetable Company, etc.,* 227 NLRB No. 293. Under these circumstances, I find that the General Counsel has failed to prove that Respondents bargained to an impasse on this nonmandatory subject of bargaining, and, accordingly, shall recommend that this part of the complaint be dismissed.

c. *The exemptions clause; the 1950 pension trust; the exclusion of Local 1854*

The Charging Party takes the position that Respondents violated Section 8(b)(3) of the Act by insist-

ing to the point of impasse that Amax agree to the following contract proposals which the Charging Party contends are nonmandatory subjects of bargaining: the 1950 pension trust; the exemptions clause; and the exclusion of Local 1854 as a party to the contract. None of these proposals are specifically alleged in the amended consolidated complaint as nonmandatory subjects of bargaining which Respondents insisted upon to a point of impasse. The Charging Party urges that this allegation is encompassed within the broad allegation of paragraph 17(k) of the complaint, which as amended during the hearing reads as follows:

> Respondent has refused to bargain in good faith with the Employer, has engaged in surface bargaining, has negotiated with the Employer in bad faith, has exhibited a predetermined resolve not to agree to any proposal but their own, and *has insisted upon including nonmandatory and unlawful clauses in any collective bargaining agreement.* [Emphasis added.]

The Charging Party's argument must be evaluated in the light of the circumstances surrounding this amendment to the complaint.

The complaint, at the start of the hearing, in pertinent part alleged that Respondents violated Section 8(b)(3) by adamantly insisting to an impasse that Amax agree to certain nonmandatory and illegal contract proposals and, in this regard, either quoted the offending clause in *haec verba* or described the portion of the contract proposal involved. Neither the exemptions clause nor the 1950 pension trust fund, nor the clause dealing with the exclusion of Local 1854 as a party to the contract were named or otherwise referred

to in the complaint as constituting nonmandatory or illegal subjects of bargaining. Also, the complaint did not allege overall bad-faith bargaining by the Respondents, rather, paragraph 17(k) alleged in substance that Respondents engaged in bad-faith surface bargaining "*in that* Respondents have exhibited a predetermined resolve not to agree to any proposal but their own [emphasis added]." During the first 2 days of the hearing the Charging Party attempted to adduce evidence with respect to contract proposals offered by the UMWA which it contended were illegal or nonmandatory bargaining subjects, but were not alleged as such in the complaint. Respondents objected and, during on-and off-the-record discussions with the parties, I made it clear that, in view of the multitude of issues involved in this proceeding, in an effort to make absolutely sure Respondents knew what they were defending against, I intended to strictly limit the Charging Party and the General Counsel to the allegations of the complaint and would make no findings with respect to whether contract proposals were nonmandatory or illegal subjects of bargaining if they were not specifically alleged as such in the complaint (Tr. 102-103). Likewise, in connection with the Charging Party's effort to adduce evidence, over the objections of Respondents, to prove that Respondents had engaged in overall bad-faith bargaining, I made it clear to the litigants that, as I viewed them, the pleadings did not allege such a violation, but simply alleged Respondents had engaged in bad-faith table bargaining by virtue of one type of conduct, namely, "in that Respondents have exhibited a predetermined resolve not to agree to any proposal but their own." Thereafter, toward the end of the 2nd day of the hearing, the General Counsel moved to amend the complaint to in-

clude additional illegal and nonmandatory bargaining subjects which, as in the case of the already alleged illegal and nonmandatory contract proposals, the General Counsel spelled out in *haec verba* or were otherwise identified. The disputed contract proposals involved herein were not included in this amendment even though the General Council had previously been placed on notice that I would make no Section 8(b)(3) or Section 8(b)(4)(A) findings based upon so-called nonmandatory or illegal contract clauses if they were not specifically pleaded in the complaint. The General Counsel also moved to amend paragraph 17(k) of the complaint, as described in detail *supra,* so as to allege overall bad-faith bargaining. It was not my intention in granting this motion to amend, over the Respondents' objection, to allow the General Counsel or the Charging Party to use paragraph 17(k) as a vehicle to search the record at the conclusion of the hearing and urge that certain contract proposals not specifically named in the complaint were nonmandatory subjects which the UMWA had insisted upon to an impasse in violation of Section 8(b)(3) of the Act. Quite the contrary, when the amendments were offered and received, I made it clear to the parties, on and off the record, that the amendment to paragraph 17(k) was being allowed only so far as it broadened that allegation to place into issue the contention that Respondents had engaged in overall bad-faith bargaining (Tr. 303-307).

In view of the aforesaid circumstances, I find that the question of whether the contract proposals involved herein constitute nonmandatory bargaining subjects, and, whether the parties bargained to an impasse over any one of them, was not within the scope of the amended consolidated complaint. It is plain that, because of my

rulings made at the hearing, Respondents were led to believe that such matters were not being litigated and were not afforded an opportunity to fairly litigate such matters. For these reasons I have not considered the Charging Party's contention that the Respondents violated Section 8(b)(3) of the Act by insisting to an impasse that the Company agree to the aforesaid contract proposals.

I realize that evidence pertaining to Respondents' bargaining position taken with respect to the disputed proposals was received into evidence in connection with the allegation that Respondents "exhibited a predetermined resolve not to agree to any proposal but their own." This does not establish that the question of whether these proposals constitute nonmandatory bargaining subjects over which Respondents bargained to a point of impasse was fully litigated. This is not simply a situation wherein a respondent was not placed on notice by the terms of the complaint that it was required to defend itself against charges that certain contract proposals were nonmandatory subjects of bargaining, rather it involves a situation where a respondent during the course of a hearing, after objecting to the receipt of evidence pertaining to certain contract proposals not alleged as illegal or nonmandatory contract proposals, was specifically assured by the Administrative Law Judge that he would make no findings that a clause was either a nonmandatory or illegal bargaining subject unless it was specifically pleaded as such in the complaint. Thereafter, the General Counsel was permitted to amend the complaint to allege additional contract clauses as illegal or nonmandatory bargaining subjects but failed to include the disputed clauses in his amendment. Under these circumstances, to say that the question of whether

the disputed clauses were nonmandatory subjects of bargaining insisted upon by the Respondents to an impasse was fully litigated would be to deny Respondents a fair trial.

5. *The contract proposals which allegedly violate Section 8(e) of the Act*

a. *The "successorship clause"*

The UMWA included a provision in the collective-bargaining agreement that it proposed which would have required Amax to make any sale or conveyance of the operations covered by the agreement conditional upon the successor's assumption of Amax's obligations under the agreement. The complaint in substance alleges that the "successorship clause" is proscribed by Section 8(e) of the Act, hence Respondents violated Section 8(b)(3) of the Act by adamantly insisting upon its acceptance and violated Section 8(b)(4)(i) and (ii)(A) of the Act by engaging in a strike where an object thereof was to require Amax to agree to a contract which included the "successorship clause."

> The "successorship clause" reads as follows: This Agreement shall be binding upon all signatories hereto and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this agreement. Provided that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obli-

gations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

The "successorship clause" was included in the UMWA's first contract proposal of January 6, 1975, and in the succeeding ones of January 27, 1975, February 26, 1975, and July 1, 1975. The clause was not included in Amax's first contract proposal of January 6, 1975, and at the negotiation meeting held on that date Amax objected to its inclusion in the UMWA's proposal. Thereafter, Amax included the clause in its contract proposal of January 11, 1975, February 18, 1975, and March 14, 1975. Subsequently, at the negotiating meetings held July 21-22, 1975, Amax's negotiators objected to the clause, explaining to the UMWA's negotiators that the Board's General Counsel had recently challenged the clause's legality. This objection was renewed by Amax during the next negotiating meetings held August 7-8, 1975. The UMWA, despite Amax's objection, did not withdraw the "successorship clause" until November 14, 1975. Indeed, the UMWA on August 18, 1975, in effect informed Amax that the UMWA's contract proposal of July 1, 1975, which included the clause, remained unchanged and broke off negotiations with Amax until October 9, 1975, based on its belief that the negotiations had reached an impasse. On November 14, 1975, shortly after the resumption of the negotiations, a new contract proposal was submitted by the UMWA from which the "successorship clause" was deleted, with the following explanation: "Although the UMWA is confident of the legality of the successorship clause, the Union understands the strong objections of Amax to the concept of

successorship and has withdrawn its proposal in the interests of reaching agreement."

The terminology, "operations covered by this agreement," in the "successorship clause," covers not just the Belle Ayr Mine, but, as described in the previous section dealing with the "coal lands clause" and "enabling clause," covers all of the western coal lands and facilities owned, operated or leased by Amax as of the date of the agreement's execution, or which Amax acquired during the term of the agreement which were "put into production or use," provided that the UMWA establishes its status as majority representative of the employees employed at such mines or facilities.[65]

Amax, as found *supra,* operates several mines in the midwest, not covered by the contract negotiations involved in this case, but operates only one western mine, the Belle Ayr Mine. However, Amax owns or leases substantially more parcels of coal land than those which make up the Belle Ayr Mine and its midwestern mines. Amax continually purchases coal lands but "seldom sells" coal lands, rather it continually trades coal lands which it owns or leases for coal lands owned or leased by other coal producers. The reason for this is that, since many of the parcels or coal leases acquired by Amax are small and noncontiguous, it is essential for

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65. The proviso concerning the UMWA's representative status was not included in its initial contract proposals but the record establishes that the UMWA at all times intended that the extension of the agreement to Amax's western facilities, other than the Belle Ayr Mine, was conditioned upon the UMWA's acquisition of majority status. Yablonski and Edelman early during negotiations, on separate occasions, in effect so informed Amax's negotiators.

Amax to trade these parcels for others in order to put together a large enough contiguous block of land to support a "viable mining plan," one which will enable Amax to use its land to produce coal. In this regard, the record establishes that Amax does not use its coal lands to produce or process coal unless the area is large enough to support 15 to 20 years of mining operations. It is a fair inference, from the aforesaid circumstances, that Amax's trading of its coal lands involves noncontiguous parcels not used by Amax to produce or process coal since they do not constitute a "viable mining plan." It is also a fair inference that coal lands which constitute a viable mining plan such as the parcels which comprise the Belle Ayr Mine and other facilities which are being used to produce or process coal are seldom if ever traded by Amax.

General Counsel and Charging Party, relying upon the Board's decision in Commerce Tankers,[66] contend that the "successorship clause" violates Section 8(e) of the Act because the limitations placed on the transactions covered by the clause are encompassed within the "cease doing business with any other person" language of that section of the statute, and the clause cannot be viewed as "primary" under *National Woodwork.*[67] Thus, by insisting to impasse that Amax agree to this clause and by striking for a contract which included this clause, General Counsel and Charging Party contend, Respondents violated Section 8(b)(3) and 8(b)(4)(A) of the Act as alleged in the complaint. In opposition, the

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66. *National Maritime Union of America, AFL-CIO; Commerce Tankers Corporation,* 196 NLRB 1100, enfd. 486 F.2d 907 (C.A. 2).

67. *National Woodwork Manufacturers Association* v. *N.L.R.B.,* 386 U.S. 612.

Respondents, relying upon *National Woodwork,* contend the "successorship clause" is "primary" in character, rather than "secondary," and, in any event, it does not constitute an agreement to cease "doing business" within the meaning of Section 8(e) of the Act, citing *Cascade Employers Assn.*[68] and *Harris Truck.*[69] Also, Respondents urge the evidence is insufficient to establish that the UMWA bargained to an impasse over the disputed clause.

In agreement with Respondents, for the reasons set out herein, I conclude that the "successorship clause," if agreed to by Amax, would not require Amax to cease "doing business" within the meaning of Section 8(e) of the Act, and, in any event, the clause is "primary" in character.[70]

The Board in a series of recent cases—*Cascade Employers Assn., supra, Harris Truck, supra,* and *Bader Brothers*[71]—held that successorship clauses virtually identical to the one involved here are not encompassed within the literal meaning of Section 8(e) because the

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68. *International Union of Operating Engineers, Local No. 701 (Cascade Employers Association),* 221 NLRB 751.

69. *District No. 71, International Association of Machinists and Aerospace Workers (Harris Truck and Trailer Sales),* 224 NLRB No. 10.

70. In view of this conclusion, I have not considered Respondents' further argument that their conduct is not violative of Section 8(b)(3) because the evidence fails to establish bargaining about the "successorship clause" had reached a point of impasse.

71. *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Bader Brothers Warehouses, Inc.),* 225 NLRB No. 78.

limitations placed on transactions covered by this type of a clause are not encompassed within the "cease doing business with any other person" language of that section of the statute. The instant case is not significantly distinguishable from these cases. Contrary to the General Counsel and the Charging Party, I do not view *Commerce Tankers, supra,* as precedent for the conclusion that the "successorship clause" is unlawful under Section 8(e). In *Commerce Tankers,* the contracting employer, Commerce, despite a successorship clause in its contract with the National Maritime Union (NMU), attempted to sell its last steamship, the S.S. Barbara, to another shipping company without securing an undertaking from this company to honor the NMU's collective-bargaining agreement. It was in this context the legality of the successorship clause involved in that case was litigated. The Board concluded the sale of the S.S. Barbara constituted "doing business" within the meaning of Section 8(e) for the reason that the sale of vessels, such as the S.S. Barbara, in the maritime industry was not a novel situation but a fairly common occurrence in the normal course of "doing business." 196 NLRB at 1100-1101. In the instant case, although Amax normally trades coal lands, the disputed successorship clause, as I have found *supra,* does not cover property traded by Amax but is limited to lands used by Amax which are rarely, if ever, traded. Under these circumstances, the instant case is not governed by *Commerce Tankers,* rather it is governed by the Board's decisions in *Harris Truck* and *Cascade Employers Assn.* and *Bader Brothers.*

Assuming, however, the "successorship clause" reaches the kind of transaction which constitutes "doing business" within the meaning of Section 8(e) of the

Act. I am of the opinion that the clause is designed to protect the interests of the unit employees, thus, it is still not proscribed by Section 8(e). Thus, in a case involving a successorship clause which provided that if all or part of the Employer's operation was transferred, the operation would continue to be the subject of the terms of the Employer's collective-bargaining agreement, the Board held that the clause did not run afoul of Section 8(e). *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Bader Brothers Warehouses, Inc.),* 225 NLRB No. 78. In *Bader Brothers,* the Board found that the objective of the successorship clause was the protection and preservation of the jobs of the unit employees, and that there was no evidence that the clause was aimed at fostering the union's own organizational interests distinct from the unit employees' job security.[72] *Bader Brothers,* 225 NLRB No. 78, slip opinion at pages 12-14. The successorship clause in dispute in this case is identical, in pertinent respects, to the one involved in *Bader Brothers.* Likewise, there is no evidence that the clause was aimed at fostering the UMWA's own organizational interests as distinct from the unit employees' job security.[73] Accordingly, for the reasons set forth in *Bader Brothers, supra,* I find that the objective of the disputed successorship clause is the protection of bar-

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72. In so concluding, the Board noted that its decision in *Harris Truck* constituted an alternate ground for concluding that the clause was not proscribed by Section 8(e). *Bader Brothers,* 225 NLRB No. 78, note 1.

73. In *Cascade Tankers, supra,* relied upon by the General Counsel and the Charging Party, there was extrinsic evidence which established that the successorship clause was being used to foster the union's own organizational interests.

gaining unit work, thus, it is not proscribed by Section 8(e) of the Act.

Based on the foregoing, I shall recommend that the allegations of the complaint which pertain to the "successorship clause" be dismissed in their entirety.

b. *The "leasing-licensing out clause"*

The UMWA in its first contract proposal submitted on January 6, 1975, included a provision entitled "Leasing, Subleasing and Licensing Out of Coal Lands," herein called the "leasing-licensing out clause," which reads as follows:

> The employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this agreement or any section, paragraph or clause thereof.
>
> Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the work is performed by members of the United Mine Workers of America in the manner and to the extent permitted by law and that the licensing out does not cause or result in the layoff of employees of the Employer; provided, however, that either the licensor or licensee, lessee or sublessee makes the appropriate payments provided by this Agreement to the United Mine Workers of America Health and Retirement Fund and otherwise abide by the terms of the Agreement.

The complaint alleges in substance that the "leasing-licensing out clause" is proscribed by Section 8(e) of

the Act, hence, Respondents violated Section 8(b)(3) by adamantly insisting upon its acceptance and violated Section 8(b)(4)(A) by engaging in a strike where an object thereof was to require Amax to agree to a contract which included this clause.

Amax's negotiators during the negotiating meeting held on January 6, 1975, objected to the "leasing-licensing out clause." Immediately thereafter Amax incorporated the clause into its contract proposal of January 11, 1975, and February 18, 1975, but deleted the clause from its contract proposal offered March 14, 1975.[74] The UMWA included the disputed clause in its contract proposal of January 27, 1975, and February 26, 1975, but in its next proposal of July 1, 1975, deleted the second paragraph in its entirety and continued to propose the first paragraph for the remainder of the negotiations.

I find the record demonstrates Respondents insisted to impasse that Amax accept the "leasing-licensing out clause" and that one of the objects of their strike against Amax was to require Amax to sign a contract which included this clause. I recognize that up until March 4, 1975, Amax, by its conduct, of incorporating the disputed clause into its contract proposal, indicated it was not opposed to this part of the UMWA's proposal. However, after objecting on March 4, 1975, that the clause was illegal, Amax deleted it from its March 14 contract offer. This conduct amounted to an unequivocal signal to the UMWA that Amax objected to this provision. Neverthe-

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74. Amax's negotiators on March 4, 1975, in effect withdrew the "leasing-licensing out clause" from their proposed contract when they objected on that date to this clause.

less, the UMWA did not withdraw the "leasing-licensing out clause" nor did it indicate it intended to withdraw it from the bargaining table, but instead, on April 10, 1975, informed Amax it was rejecting Amax's March 14 offer and that the Union's last contract proposal remained unchanged. It is plain that at this point the parties had reached an impasse over the disputed clause, which impasse was not broken until July 1, 1975, when the UMWA deleted a significant part of the clause. Indeed, in their post-hearing brief Respondents concede that "the disputed clause was at impasse for a maximum of three months."

General Counsel and Charging Party contend the "leasing-licensing out clause" is an impermissible "union signatory" agreement proscribed by Section 8(e), thus, by insisting to impasse that Amax accept this clause and by striking for a contract which includes this clause, Respondents violated Section 8(b)(3) and 8(b)(4)(A), as alleged in the complaint. Respondents take the position these allegations should be dismissed because the disputed clause does not come within the scope of Section 8(e) and, even if 8(e) is applicable, the clause is "primary."

Respondents, citing *Harris Truck, supra,* and *Cascade Employers, supra,* contend that "the transactions covered by the leasing-licensing out clause do not constitute 'doing business' within the meaning of Section 8(e) of the Act." I disagree. The Board and the courts have consistently interpreted the interruption of a relationship between either a lessor-leasee or licensor-licensee as within the ambit of the statutory phrase "cease doing business." See *Retail Fruit & Vegetable Clerks* v. *N.L.R.B.,* 249 F.2d 591, (C.A. 9). Indeed, "the phrase

'doing business', would ordinarily cover doing any business which the third party is free to discontinue. . . . The phrase, 'cease doing business', is general. . . ." *Id.* at 595. However, in *Cascade Employers, supra,* and its progeny, after an examination of the legislative history of Section 8(e) and the need to accommodate that section of the statute with other relevant sections, the Board concluded that so-called successorship clauses, which deal with situations wherein it was contemplated that the "employing industry" would remain the same after a business transfer, did not contemplate a cessation of business within the intent of Section 8(e) of the Act. The Board concluded that, as contemplated by a successorship clause, the sale or transfer of an enterprise in whole or part "is generally viewed not as a business transaction, but as a substitution of one entity for another while the conduct of business continues without interruption." *Harris Truck, supra,* 224 NLRB No. 10, slip opinion at page 9. In other words, the cases cited by Respondents are limited to successorship clauses. The "leasing-licensing out clause" in dispute here does not remotely resemble a successorship clause. No evidence was adduced to establish that the UMWA intended for the clause to operate in the manner of a successorship clause. Quite the contrary, the UMWA's proposed contract contains a separate "successorship clause," discussed *supra,* which is strong evidence that the "leasing-licensing out clause" was not intended to serve as one. In these circumstances, I reject Respondents' defense that "the transactions covered by the leasing/licensing clause do not constitute 'doing business' within the meaning of Section 8(e) of the Act."

As the Supreme Court explained in *National Woodwork Manufacturers Association* v. *N.L.R.B.,* 386 U.S.

612, 633-634, Section 8(e) was intended to supplement the existing prohibitions against secondary boycotts. It does not prohibit all union-employer agreements which may have the incidental effect of a cessation of business with other employers. Rather, Congress intended that Section 8(e) would embody the same distinction between lawful primary and unlawful secondary boycott activity contained in Section 8(b)(4). *Id.* at 623-639. Accordingly, a collective-bargaining agreement violates Section 8(e) if its "tactically calculated to satisfy union objectives elsewhere," rather than to forward the interests of the employees within the unit. *Id.* at 644-645. Guided by these principles, I find that the second paragraph of the "leasing-licensing out clause" is, and the first paragraph is not, proscribed by Section 8(e) of the Act.

The first paragraph is addressed only to the actions of the signatory employer and the interests of the unit employees. It secures an agreement that the signatory employer will not transfer coal lands by lease, sublease or license where "the purpose thereof is to avoid the application of this Agreement." On its face the first paragraph is designed to prevent the erosion of the contract bargaining unit by a series of licensing or leasing agreements and, as such, it "is addressed to the labor relations of the contracting employer vis-a-vis his own employees," (*National Woodwork, supra,* at 645) hence it is not proscribed by Section 8(e) of the Act.

The second paragraph violates Section 8(e) because, for two separate reasons, it is an explicit "union signatory" agreement. Firstly, the clause in effect permits subcontracting only to employers who recognize the UMWA. The phrase "abide by the terms of this Agreement" covers union recognition as well as other

terms of the agreement proposed to Amax by the UMWA. *Local 437, International Brotherhood of Electrical Workers (Dimeo Construction Co.),* 180 NLRB 420. Secondly, the provision permits the subcontracting only to employers who employ UMWA members. *A. Duie Pyle Inc.* v. *N.L.R.B.,* 383 F.2d 772, 777-778 (C.A. 3); *Milk Wagon Drivers and Creamery Workers Local Union No. 66 (Carnation Company),* 181 NLRB 882, 886; *Meat & Highway Drivers, etc., Local Union No. 710* v. *N.L.R.B.,* 335 F.2d 709, 717 (C.A.D.C.). The law is settled that contract provisions like the one in dispute herein, which require or encourage a boycott of companies who do not have union contracts or employ union members, violate Section 8(e) because such a clause promotes the union's interests, "independent of the interests of the employees being represented, in furthering [the Union's] own organizational ends in protecting the interests of its other bargaining units." *N.L.R.B.* v. *National Maritime Union of America (Vantage Steamship),* 486 F.2d 907, 913 (C.A. 2). Or, as the Board, with the approval of the Circuit Court of the District of Columbia has phrased it: "Where an object of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful." *Commerce Tankers Corporation, supra,* 196 NLRB at 1101, and *Meat & Highway Drivers, etc., Local 710* v. *N.L.R.B., supra,* 335 F.2d at 716. In sum, the disputed clause, insofar as it allows contracting out only to companies who employ UMWA members and who abide by the terms of the UMWA-Amax collective-bargaining agreement, does not meet the *National Woodwork* test of being "addressed to the labor relations of the contracting employer vis-a-vis his own employees," rather it is calculated to control the labor relations of other em-

ployers and the collective-bargaining representation of other employees. Therefore, it is inescapably secondary in its aim and, thus, violates Section 8(e).

Respondents adduced no testimony that the intent of the disputed clause is to protect unit work or union standards. In any event, such testimony would have been irrelevant where, as here, the contractual provision on its face manifests a secondary object. For, "if the meaning of the clause [at issue] is clear, the Board will determine forthwith its validity under 8(e)." *General Teamsters, Local 982 (J. K. Barker Trucking Co.),* 181 NLRB 515, 517, enfd. *sub nom., Joint Council of Teamsters No. 42* v. *N.L.R.B.,* 450 F.2d 1322; see, also, *Dimeo Construction Company, supra,* 180 NLRB at 421. The General Counsel is not required, in such a case, to prove further that such a secondary object was actually intended: "The contract must be tested by its terms." *Truck Drivers Local 413* v. *N.L.R.B.,* 334 F.2d 539, 542 (C.A.D.C.).

Respondents urge that the provision which requires that work shall be performed by members of the UMWA does not run afoul of 8(e) because it is merely a requirement that the licensee or leasee employ laid-off bargaining unit employees. The provision, however, does not say this either directly or by implication and I cannot agree with Respondents' further contention that the provision is "ambiguous." I realize that it allows licensing out "if the work involved is performed by members of the UMWA *in the manner and to the extent permitted by law* [emphasis added]," and I have carefully considered those cases involving overly broad union-security clauses wherein the Court of Appeals for the Seventh Circuit and the Board have concluded that so-called "deferral" or "savings" clauses, worded similarly to the one in-

volved here, rendered the clauses capable of a lawful construction. See *John L. Lewis, et al.* v. *Quality Coal Corp.*, 270 F.2d 140 (C.A. 7); *Perry Coal Company, et al.* v. *N.L.R.B.*, 284 F.2d 910 (C.A. 7); *Quality Coal Corporation*, 139 NLRB 492, 495. These cases, for the reasons set forth in *Essex County District Council of Carpenters*,[75] are distinguishable in significant respects from the instant situation.[76] Accordingly, I find that the deferral clause attached to the disputed "leasing-licensing out clause," as well as the similar deferral clauses attached to other disputed clauses, discussed *infra*, do not render these clauses ambiguous or otherwise constitute a valid defense to the allegations of the complaint.

Likewise, I reject Respondents' contention that the requirement that the licensee or leasee "abide by the terms" of the UMWA's collective-bargaining agreement with Amax "is simply a catch all clause that requires

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75. *Essex County District Council of Carpenters, etc. (Associated General Contractors of Essex County)*, 141 NLRB 858, 869-870.

76. Although not specifically mentioned in *Essex County District Council of Carpenters*, another basis for distinguishing the use of the deferral clauses in situations involving overly broad union-security agreements from those involving clauses proscribed by Section 8(e) is that in the former situation a deferral clause has the effect of modifying and limiting the application of the union-security agreement to conform to existing or future laws, whereas, in the latter situation, it is necessary for the parties to do more than just modify or limit the application of the illegal clause, rather, the clause has to either be deleted in its entirety or replaced by a lawful union standards or work protection clause. Cf. *Amalgamated Lithographers of America, etc. (Miami Post Co.)*, 130 NLRB 968, 977-978, enfd. 301 F.2d 22, 29-30 (C.A. 5).

the successor employer to adhere to union standards." The UMWA's proposed contract included "terms" not required to protect the interests of the employees in the bargaining unit. The licensee or leasee, pursuant to the terms of the contract, is required to recognize the UMWA as the employees' bargaining representative and to adhere not only to the contractual wage-and-hour terms but also to such contractual working conditions as seniority and grievance procedure and dues checkoff. See *Dimeo Construction Co., supra,* 180 NLRB at 421.

Based upon the foregoing, I find that the second paragraph of Article 2, section (h), of the UMWA's proposed contract—the "leasing-licensing out clause"—violated Section 8(e) of the Act and that Respondents, by engaging in a strike with an object of forcing or requiring Amax to accept a collective-bargaining agreement which included this provision, violated Section 8(b)(4)(i) and (ii)(A) and 8(b)(3)[77] of the Act, and by insisting to impasse that Amax sign a collective-bargaining agreement which contained this provision, have further violated Section 8(b)(3) o fthe Act.

c. *The "coal transportation clause"*

The UMWA's first contract proposal of January 6, 1975, included a provision which dealt with the "con-

77. "A strike to compel inclusion of illegal provisions in a contract is a violation of Section 8(b)(3)." *Amalgamated Lithographers of America, etc.,* 130 NLRB 985, 991. The complaint alleges only that Respondents violated Section 8(b)(3) by adamantly insisting that Amax agree to the disputed clause. However, the object of the Respondents' strike was fully litigated in connection with this particular issue as well as with other issues raised by the pleading.

tracting and subcontracting" of the "transportation of coal," herein called the "coal transportation clause," which reads as follows:

ARTICLE II

Section (g), Contracting and Subcontracting

(a) Transportation of Coal—the transportation of coal as defined in paragraph (a)[78] may be contracted out only to a contractor employing members of the UMWA under this agreement and only where contracting out such work is consistent with the prior practice and custom of the Employer.

The complaint alleges in substance that the "coal transportation clause," as quoted above, violates Section 8(e) of the Act, hence, Respondents violated Section 8(3) by adamantly insisting upon its acceptance and violated Section 8(b)(4)(A) by engaging in a strike where an object thereof was to require Amax to agree to a contract which included this provision.

Amax at the first bargaining session of January 6, 1975, and then again at the one held March 4, 1975, objected to the disputed provision, expressing the view that it was illegal. None of Amax's contract proposals in-

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78. Article II, section (a), entitled "work jurisdiction," of the UMWA's January 6 proposal provides in pertinent part: "The . . . transportation of coal (except by waterway or rail not owned by Employer) . . . shall be performed by classified employees of the employer . . . ." This provision was changed in the UMWA's next proposal of January 27 to read: "The . . . transportation of coal in and around the mine and to a screening, crushing, washing or other preparation facility, or other mine related operations (except by waterway or rail not owned by the Employer) . . . shall be performed by classified employees of the Employer . . . ."

cluded such a provision. The UMWA continued to include the provision in its contract proposal of January 27, 1975, and February 26, 1975, and on April 10, 1975, notified Amax that its last contract proposal, which included the "coal transportation clause," remained unchanged. During the period in which the disputed clause remained a part of the UMWA's contract proposal the UMWA was engaged in a strike against Amax at the Belle Ayr Mine in support of its proposed contract. Based on the foregoing, I find Respondents insisted to the point of impasse that Amax accept a contract which included the "coal transportation clause" and that an object of the strike was to require Amax to accept a contract which included this clause.

General Counsel and Charging Party urge that the "coal transportation clause" is an illegal "union signatory" agreement designed to benefit UMWA members generally rather than the Belle Ayr miners. Respondents contend that it is a lawful work preservation clause designed to maintain the jobs and work standards of the Belle Ayr miners. I am of the view that the evidence is insufficient to prove that the limitation of subcontracting to "prior practice and custom" violates Section 8(e) of the Act, but, in agreement with the General Counsel and Charging Party, find that the clause violates Section 8(e) insofar as it limits the subcontracting of the transportation of coal "only to a contractor employing members of the UMWA under this agreement."

A union has a legitimate interest in preventing the undermining of the work opportunities and standards of employees in the contractual bargaining unit by subcontractors who do not meet the prevailing wage scales and employee benefits covered by the contract. See *Truck*

Drivers Union Local 413 v. *N.L.R.B. (Brown Transportation Corp.; Patton Warehouse)*, 334 F.2d 539, 548 (C.A. D.C.). Its contract with an employer may include a so-called union standards clause which does not violate Section 8(e) because it has a primary object to aid the employees in the work unit. Where, however, the object is not to protect or preserve the standards of employees in the unit, but to control the employment practices of firms which seek to do business with the employer and to aid and assist union members generally, such object is secondary and unlawful. *Meat and Highway Drivers, etc,. Local 710 v. N.L.R.B. (Wilson & Co.)*, 335 F.2d 709, 716 (C.A.D.C.) A collective-bargaining agreement violates Section 8(e) if it is "tactically calculated to satisfy union objectives elsewhere," rather than to advance the interests of employees within the unit. *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612, 644-645.

Here, the "coal transportation clause" provides that Amax may subcontract the transportation of its coal "only to a contractor employing members of the UMWA under this agreement."[79] The disputed clause expressly requires that not only shall the subcontractor agree that its employees will receive the economic benefits of the contract, which would serve the purpose of protecting the interests of the employees in the contract unit, but

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79. I reject Respondents' contention that this portion of the clause is ambiguous and may be reasonably construed as providing "that if transportation of coal is subcontracted out it must be subcontracted out . . . . to employers who maintain the standards of the UMWA agreement." I have considered Respondents' ingenious exercise in logic upon which this contention is based but am of the opinion it is a far-fetched interpretation.

it also requires him to adhere to the noneconomic terms of the contract, such as, recognition, dues checkoff, seniority and grievance-arbitration clauses, which would be unrelated to this lawful purpose. E.g., *Dimeo Construction, supra,* 180 NLRB 420. Moreover, the clause also ambiguously provides that Amax may contract out only to contractors who employ UMWA members. Thus, the beneficiaries of this provision are not those members employed at the Belle Ayr Mine but the UMWA as a whole. *Meat and Highway Drivers, etc., Local No. 710* v. *N.L.R.B.,* 335 F.2d 709, 717 (C.A.D.C.); see, also, *National Maritime Union (Vantage Steamship),* 196 NLRB 1100, 1101 ("where an object of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful"). In sum, the "coal transportation clause" does not require a signatory to terminate or otherwise curtail contracting out absolutely but only as to those contractors who do not employ UMWA members and who do not recognize the UMWA as their employees' collective-bargaining representative. The effect of this is to make the continuance of the relationship between the signatory employer and any contractor depend upon the latter's decision to employ members of the UMWA and to recognize the UMWA as his employees' bargaining representative. Thus, a significant factor in determining whether or not the signatory employer does business with a contractor depends upon the contractor's internal labor relations policy and not the contractor's maintenance of union wage scales or similar conditions which might otherwise adversely affect the bargaining unit members. In these circumstances, I cannot find that the "coal transportation clause" is addressed to the labor relations of the contracting employer vis-a-vis its own employees, but rather

I find it was tactically calculated to achieve union objectives elsewhere. Accordingly, I find that the clause is an unlawful "union signatory" provision and therefore violates Section 8(e) of the Act.

Based on the foregoing, I find that the "coal transportation clause," Article II, section (g)(1), of Respondent's proposed contract violates Section 8(e) of the Act and that Respondents, by engaging in a strike with an object of forcing or requiring Amax to enter into a collective-bargaining agreement containing this provision, violated Section 8(b)(4)(i) and (ii)(A) and 8(b)(3),[80] and, by insisting to impasse that Amax accept a collective-bargaining agreement which contained this provision, Respondents have further violated Section 8(b)(3) of the Act.

d. *The "repair and maintenance work clause"*

The UMWA's first contract proposal of January 6, 1975, included a provision which dealt with the contracting and subcontracting of repair and maintenance work, herein called the "repair-maintenance work clause," which reads as follows:

ARTICLE II

Section (g) Contracting and Subcontracting

(2) Repair and Maintenance Work-Repair and maintenance work customarily performed by classified employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty or (b) where the Employer does

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80. See footnote 77, *supra*.

not have available equipment or regular employees with necessary skills available to perform the work at the mine or central shop, provided, however that the work shall be performed by UMWA members to the extent and in the manner permitted by law.

The complaint alleges, in substance, that this provision, as quoted above,[81] violates Section 8(e) of the Act, thus, the complaint further alleges, Respondents violated Section 8(b)(3) by adamantly insisting upon its acceptance and violated Section 8(b)(4)(i) and (ii)(A) by engaging in a strike where an object thereof was to require Amax to agree to a contract which includes this provision.

On January 6, 1975, at the first bargaining session, and then again at the one held March 4, 1975, Amax objected to the "repair-maintenance work clause," expressing the view that it was illegal. During the relevant time period herein, Amax's contract proposal did not include this provision. To the contrary, Amax's first contract proposal submitted on January 6, 1975, gave itself complete freedom to contract out repair and maintenance work. This freedom was curtailed in Amax's February 18, 1975 proposal which provided that "no existing em-

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81. The UMWA contract proposal of July 1, 1975, changed the clause's final proviso to read: "provided, however, that the work shall be performed under union standards applicable in the area." The next UMWA contract proposal of November 14, 1975, further modified this proviso to read: "under UMWA standards" instead of "Union standards." The complaint does not question the legality of these subsequent proposals. Accordingly, I have not considered the Charging Party's contention that, as worded on July 1, 1975 and November 14, 1975, the "repair-maintenance work clause" violated Section 8(e).

ployee will be laid off" as the result of the subcontracting of maintenance or repair work. The UMWA included the disputed clause in its contract proposals of January 6, 1975, January 27, 1975, and February 26, 1975, and on April 10, 1975, notified Amax that its last contract proposal, which included the disputed clause, remained unchanged. During the period when the "repair-maintenance work clause" remained a part of the UMWA's contract proposal, the UMWA was engaged in a strike at the Belle Ayr Mine, accompanied by picketing, in support of its proposed contract. Considering all of the foregoing circumstances, and the entire record, I find Respondents insisted to the point of impasse that Amax agree to the "repair-maintenance work clause" and that an objective of the strike against Amax was to require Amax to sign a contract which included this clause.

The "repair-maintenance work clause" permits the signatory employer to subcontract out repair and maintenance work customarily done by the employer's employees in situations involving warranty work or where equipment is not available or where there are no regular employees available to perform the work, "provided, however, that the work, shall be performed by UMWA members to the extent and in the manner permitted by law." The UMWA takes the position that the restriction of subcontracting to persons who employ UMWA members is nothing but a permissible union standards restriction. The Charging Party and General Counsel urge that this restriction is based on illegal secondary objectives. In the alternative, the Charging Party contends that even if the restriction of subcontracting to persons who employ UMWA members is not an illegal limitation, the disputed clause is still outlawed by Section 8(e) be-

cause it does not encompass fairly claimable unit work. I am of the opinion that the "repair-maintenance work clause" violates Section 8(e).

The short answer to Respondents' contention, that restricting subcontracting to persons who employ UMWA members, is a permissable union standards provision is that such a restriction, on its face, indicates that the subcontracting agreement is not addressed to the labor relations of the contracting employer vis-a-vis his own employees.[82] See *A. Duie Pyle Inc.* v. *N.L.R.B.*, 383 F.2d 772, 777-778 (C.A. 3); *Meat and Highway Drivers, etc., Local Union No. 710* v. *N.L.R.B.*, 335 F.2d 709, 717 (C.A.D.C.); *Milk Wagon Drivers and Creamery Workers Local Union No. 66 (Carnation Co.)*, 181 NLRB 882, 886; also see the discussion, *supra,* in connection with the "leasing-licensing out clause." Likewise, for the reasons set forth *supra,* in connection with the "leasing-licensing out clause," I am of the opinion that the deferral clause does not render ambiguous the requirement that subcontracting be restricted to persons who employ UMWA members, nor does it otherwise constitute a valid defense to the allegations of the complaint.

Based on the foregoing, I find that the "repair-maintenance work clause," Article II, section (g)(2) of the UMWA's contract proposal, violates Section 8(e) of the Act, and that Respondents, by engaging in a strike with

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82. In urging that the clause in question does not have an illegal secondary objective, Respondents point to a February 18, 1975 negotiating meeting discussion between the parties' principal negotiators. However, this discussion occurred in connection with the disputed "construction clause," discussed *infra,* not the instant one; thus, it sheds no light at all upon Respondents' objective in proposing the instant clause.

an object of forcing or requiring Amax to enter into an agreement containing this provision, violated Section 8(b)(4)(i) and (ii)(A) and 8(b)(3)[83] of the Act, and, by insisting to impasse that Amax accept a collective-bargaining agreement which contained this provision, Respondents have further violated Section 8(b)(3) of the Act.

I reject the Charging Party's alternative theory advanced to support the finding of a violation. This theory rests upon the proposition that the restriction, included in the disputed provision, upon the subcontracting of maintenance and repair work "where the employer does not have available equipment or regular employees with necessary skills available to perform the work" is not work performed by the unit employees and, as such, is not subject to restriction by an otherwise valid union standards clause, citing *Teamsters Local 216 (Bigge Drayage Co.)*, 198 NLRB 1046, 1047, enfd., 520 F.2d 172 (C.A.D.C.). *Bigge Drayage,* however, involved work acquisition. There the bargaining unit employees had never done the claimed work and their employer was not equipped to perform the work. See, generally, *Teamsters Local Union No. 94, et al. (California Dump Truck Owners Association)*, 277 NLRB No. 27, slip opinion at pages 9-10. I cannot say that the above-quoted portion of the disputed clause is an impermissible work acquisition clause rather than a lawful unit protection or union standards clause designed to preserve unit work for unit employees and to insure that negotiated standards will not be undermined. The clause, as worded, deals with "work customarily performed" by the bargaining unit's employees, and, in pertinent part, may be construed as

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83. See footnote 77, *supra.*

an "overflow clause" which may come into operation due to the employer's failure to buy or lease new equipment to replace old obsolete equipment or to replace employees who have been terminated or have voluntarily terminated their employment. In other words, the clause may be construed to have as its objective the prevention of the bargaining unit from being eroded by subcontracting. See *Meat and Highway Drivers, etc., Local Union No. 710* v. *N.L.R.B.*, 335 F.2d 709, 715-716 (C.A.D.C.), and *Teamsters Local 886 (R.P.B. Trucking)*, 172 NLRB 1037. In any event, assuming the clause in question is susceptible to the interpretation proposed by the Charging Party, it is equally, or more susceptible, to the interpretation that it covers bargaining unit work. No extrinsic evidence was adduced to indicate that the clause was intended to cover work which the unit employees do not perform.[84] In these circumstances, "where the clause is not clearly unlawful on its face, the Board will not interpret it to require no more than what is allowed by law" *General Teamsters Local 982 (J. K. Barker Trucking Co.)*, 181 NLRB 515, 517. It is for these reasons that I reject the Charging Party's alternative argument that, even if the limitation of subcontracting to persons who employ UMWA members is not an illegal restriction, the disputed clause is still outlawed by Section 8(e) because it does not encompass fairly claimable unit work.

Likewise, I reject the Charging Party's contention that since the UMWA's contract proposal covered all of

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84. The fact that there is no central shop at the Belle Ayr Mine does not lend support to the contention that the disputed clause covers work that the unit employees do not perform. All it indicates is that the clause insofar as it refers to a central shop would not apply to the Belle Ayr Mine.

Amax's western facilities, not just the Belle Ayr Mine, that it establishes an illegal secondary object for each one of the clauses involved in this case which are alleged to violate Section 8(e) of the Act. Although the UMWA's contract proposals involving the "coal lands clause" and "enabling clause," if accepted, would have required Amax to negotiate on an employer-wide basis in the west, which, under the circumstances of the case, as found *supra,* constitute a nonmandatory subject of bargaining, it is not relevant to the resolution of the question of whether certain contract proposals violate Section 8(e), a section of the statute which deals with the cessation of business between *different employers.*

e. *The construction clause*

Article II, section (i) of the UMWA contract pro posal entitled "Construction Clause," in pertinent part, restricts Amax's subcontracting of "all construction mine or mine related facilities" to contractors "under the jurisdiction of the UMWA in the manner and to the extent permitted by law." The UMWA modified this proposal during the negotiations but, as described *infra,* the limitation placed upon the contracting out of construction work, which is an issue in this proceeding, remained essentially the same throughout the negotiations. The complaint alleges in substance that the contractual provision limiting subcontracting of construction work to persons under the jurisdiction of the UMWA violates Section 8(e) of the Act, thus, Respondents violated Section 8(b)(3) by adamantly insisting upon its acceptance and violated Section 8(b)(4)(i) and (ii)(A) by engaging in a strike where an object thereof was to require Amax to agree to a contract which included this provision.

Appendix A.

On January 6, 1975, at the first bargaining session, Amax objected to the "construction clause," as proposed by the UMWA, challenging its legality. Amax's January 6, 1975 contract proposal granted it absolute freedom to subcontract out mine or mine-related construction work. On January 11, 1975, however, Amax submitted a new contract proposal which included a "construction clause" identical to the UMWA's proposal:

> All construction of mine or mine related facilities including the erection of mine tipples and sinking of mine shafts or slopes which is not performed by the Employer, may be performed by such outside contractors as are designated by the Employer, and such work will be under the jurisdiction of the UMWA in the manner and to the extent permitted by law.

The parties' contract proposals on this subject remained virtualy identical until February 17, 1975, when the UMWA modified its proposal as follows:

> All construction of mine or mine related facilities including, the erection of mine tipples which is not performed by the Employer may be performed by such outside contractors as are designated by the Employer. *Except where UMWA contractors qualified to do the work are not available,* such work will be under the jurisdiction of the UMWA in the manner and to the extent permitted by law. *In any proceeding commenced under this section, the burden of proof shall be on the Employer to prove that the UMWA contractors qualified to do the work are not avialable.* [Emphasis added to indicate modifications.]

Appendix A.

On February 18, 1975, Amax's proposal was modified as follows:

> All construction of mine or mine related facilities including the erection of mine tipples, at the mine covered by this agreement, which is not performed by the Employer, may be performed by such outside contractors as are designated by the Employer, and such work will be under the jurisdiction of the UMWA *in as far as is economically reasonable* in a manner and to the extent permitted by law. [Emphasis added to indicate modifications.]

During the February 18, 1975 negotiating meeting, Cairns, for Amax, indicated there was confusion in Amax's mind about the intent of the UMWA's proposal. Cairns explained to the UMWA's negotiators that the requirement that Amax use only contractors who employed UMWA members or contractors who belonged to the Association of Bituminous Contractors, herein called the ABC,[85] was impractical because there were no UMWA-represented construction companies located in the western part of the United States, which meant that Amax would have to use eastern contractors which was too expensive. Cairns also stated that Amax felt it should not be placed in a position where a contractor might bring a lawsuit against Amax for refusing to do business because the contractor was not an ABC con-

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85. The ABC is an employer association which represents construction industry contractors and, on their behalf, negotiates and is a party to a collective-bargaining agreement with the UMWA, the National Coal Mine Construction Agreement, which covers employees of subcontractors who perform construction work at coal mines or related facilities. Amax is not signatory to this agreement.

tractor, a contractor under contract with the UMWA. Edelman, for the UMWA, told Cairns, "I agree with your intent, and that is the intent that the Mine Workers have." Cairns asked Edelman to reduce "this intent" into writing immediately. Edelman refused, stating he would be willing to tender a memorandum of understanding on the subject at a later date.[86]

The UMWA's February 17, 1975 proposal stayed essentially the same until November 14, 1975, when it was withdrawn and the Union agreed to accept Amax's construction clause proposal. In the interim, before the UMWA's acceptance of Amax's proposal, Amax's negotiators during March 1975, July 1975, and August 1975, at negotiation meetings, objected to the UMWA's proposed construction clause, taking the position that it was illegal. Then, on December 7, 1975, Amax modified its construction clause proposal as follows:

> All construction of mine or mine related facilities . . . may be performed by such outside contractors as are designated by the Employer, and such work will be under the jurisdiction of the UMWA as far as is economically reasonable *(giving due consideration to cost, quality of work, availability, time of completion, and other appropriate business judgments)* in a manner and to the extent permitted by law. [Emphasis added to indicate the modifications made on December 7, 1975.]

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86. The description of what took place on February 18, 1975, is, for the most part, based on a composite of the testimony of Edelman and Cairns, but, where their testimony conflicts, I have credited Edelman, who, as indicated *supra,* impressed me as the more trustworthy witness.

On that date, at a bargaining session, Amax took the position that the construction clause, as well as several other clauses proposed by the UMWA, was illegal even though Amax itself was offering similar clauses which contained the alleged illegal language. Bank, for the UMWA, stated he could not understand why Amax was claiming that certain proposals were illegal yet was proposing similar clauses. Sulley, for Amax, explained that the Company was not waiving any right to object to these clauses, but in the interest of of reaching an agreement was willing to compromise on these clauses and would be willing to sign an agreement, under protest, that included the clauses. This is where the parties stood on the question of the construction clause when the negotiations broke off in February 1976.

The Charging Party and General Counsel argue that the construction clause violates Section 8(e) of the Act because it is an illegal "union signatory" agreement, that is, an agreement requiring subcontractors to have collective-bargaining agreements with the UMWA. Respondents deny this and contend that "the intent of the clause is to allow the employer to contract out the construction work at the mine to employees who meet UMWA standards." I am of the opinion that the clause is a "union signatory" agreement which violates Section 8(e) of the Act.[87]

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87. I reject the Charging Party's alternative contention that, even if the restriction is not an impermissible "union signatory" agreement, the disputed clause still violates Section 8(e) because the unit employees do not perform the construction work covered by the clause. The record does not establish this. The Board's certification which covers production and maintenance employees does not on its face support such a conclusion, nor does the fact that the mine's facilities were

The restriction of the subcontracting of all construction of mine or mine-related facilities to persons "under the jurisdiction of the UMWA" is an explicit "union signatory" agreement. Even if the phrase, "under the jurisdiction of the UMWA," is considered ambiguous, the ambiguity was removed, and the Union's intent revealed, on February 17, 1975, when the UMWA modified the clause so as to provide that construction work must be contracted out to persons under the jurisdiction of the UMWA, "except where UMWA contractors qualified to do the work are not available."[88] Under the circumstances and for the reasons given in connection with the earlier conclusion that the "coal transportation clause" and "leasing-licensing out clause" violate Section 8(e) of the Act, I find that the disputed construc-

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originally built by outside contractors. Likewise, the Employer's practice, as Payne testified, of subcontracting work—which work Payne did not describe—for which it has neither the equipment nor employees is not sufficient to support a finding that unit employees do not perform the type of construction work covered by the disputed clause.

88. I reject Respondents' contention that on February 18, 1975, UMWA negotiator Edelman in effect told Amax's negotiator Cairns it was not the intent of the construction clause to require Amax to subcontract to UMWA employers. As described above, Edelman's statement to Cairns is ambiguous. Moreover, Edelman's unconvincing reason—"I never got together with them for that purpose"—for not submitting the memorandum of understanding to Amax on this matter, as he had promised, when coupled with the unambiguous language of the clause itself which expressly restricts the subcontracting to "UMWA contractors" establishes that even if Respondents' interpretation of Edelman's comment is correct, it was not a sincere statement about the meaning of the clause.

tion clause is a "union signatory" agreement which violates Section 8(e). See *Truck Drivers Local 413* v. *N.L.R.B.*, 334 F.2d 539, 548 548 (C.A.D.C.); *Meat Highway Drivers Local 710* v. *N.L.R.B.*, 335 F.2d 709, 713, note 11 (C.A.D.C.); *N.L.R.B.* v. *Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (C.A. 9). Also, for the reasons given in connection with the earlier conclusion that the "leasing-licensing out clause" violates Section 8(e), I find the deferral proviso attached to the construction clause does not make ambiguous the requirement that the subcontracting be limited to persons "under the jurisdiction of the UMWA," nor does it otherwise constitute a valid defense to the allegations of the complaint.

The complaint alleges in substance that Respondents violated Section 8(b)(4)(i) and (ii)(A) by engaging in a strike against Amax where an object thereof was to require Amax to agree to a contract which included the construction clause and violated Section 8(b)(3) by adamantly insisting that Amax agree to a contract which included this illegal clause. Respondents take the position that, assuming the construction clause violates Section 8(e), the record nevertheless fails to establish that Section 8(b)(4)(A) and Section 8(b)(3) of the Act have been violated. Respondents argue that, since Amax included the disputed provision in its own contract proposal, bargaining never reached an impasse and logically Respondents could not have been striking to require Amax to accept a "union signatory" agreement already agreed to by Amax. The issue is a bothersome one, but on balance I find Respondents' strike against Amax, at least by the conclusion of the December 7, 1975 meeting, had as an object the requirement that Amax accept a contract which included the con-

struction clause and likewise, by at least the conclusion of the February 17-18, 1976 meetings, the parties had reached a bargaining impasse over this matter. I recognize that at the inception of the negotiations, Amax incorporated the illegal portion of the construction clause into its own contract proposal and continued to offer it throughout the negotiations and, on November 14, 1975, the UMWA accepted Amax's version of the clause. On the other hand, the record shows that Amax originally objected to the construction clause, challenging its legality, and it was only in an effort to avoid the UMWA's threatened strike that on January 11, 1975, Amax included the clause in its contract proposal. Thereafter, throughout the negotiations, Amax objected to the clause—challenging its legality—and finally on December 7, 1975, in addition to challenging the clause's legality, in effect told the UMWA that the sole reason it was including this clause in its contract proposal was that the UMWA was demanding such a clause and that in the interest of reaching agreement on a contract, Amax would go along with UMWA on this matter but would incorporate the clause in any final agreement reached by the parties only under protest. Nonetheless, in the face of Amax's opposition, the UMWA did not indicate it was amenable to dropping this provision from its proposed contract, rather it continued to strike to require Amax to accept a contract which included the construction clause. Under these circumstances, I am convinced that if there was any doubt in Respondents' mind that Amax was unequivocally opposed to the construction clause because it was illegal, this doubt was removed by at least December 7, 1975. By continuing after that date to offer a contract which included this provision, over Amax's objections, the Respondents

bargained to an impasse over this matter,[89] thus violating Section 8(b(3) of the Act. Also, I find that, by continuing after December 7, 1975, to engage in a strike against Amax for a contract which included the construction clause, Respondents violated Section 8(b)(4)(i) and (ii)(A), as alleged in the complaint, as well as Section 8(b)(3) of the Act.[90]

f. *Work jurisdiction clause*

Article II, section (a) of the UMWA contract proposal entitled "Work Jurisdiction," sets forth the work covered by the UMWA contract proposal. The clause as proposed by the UMWA throughout the negotiations, in pertinent part, reads:

> Contracting, subcontracting, leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this article [referring to Article II, sections (g), (h) and (i)].

Sections (g), (h) and (i) of Article II referred to in the work jurisdiction clause, as found *supra,* violate Section 8(e) of the Act. Accordingly, insofar as the work jurisdiction clause incorporates these illegal provisions, it likewise violates Section 8(e) of the Act.[91] Also, the

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89. The record reveals that the parties reached a bargaining impasse by the end of the negotiating meetings of February 17-18, 1976, at which time negotiations broke off. Since then until the date of the hearing in this case, July-August 1976, the parties did not meet and their bargaining positions remained unchanged.

90. See footnote 77, *supra.*

91. The complaint challenges only the legality of the work jurisdiction clause insofar as it is read in conjunction with Article II(g)(1) and (2) which deal with

record establishes that the UMWA proposed the work jurisdiction clause in the face of Amax's January 6, 1975 and March 4, 1975 objections to its legality and, on April 10, 1975, the UMWA notified Amax that the UMWA's last contract proposal, which included the work jurisdiction clause, remained unchanged. Thus, I find that by at least April 10, 1975, the UMWA and Amax had bargained to an impasse over the work jurisdiction clause. I also find that an object of the UMWA's strike was to require Amax to accept a contract which included the work jurisdiction clause.

Based on the foregoing, I find that the work jurisdiction clause, Article II, section (a) of the UMWA's contract proposal violates Section 8(e) of the Act and that Respondents, by engaging in a strike with an object of forcing or requiring Amax to enter into an agreement containing the work jurisdiction clause, violated Section 8(b)(4)(i) and (ii)(A) and 8(b)(3) of the Act, and further violated Section 8(b)(3) by insisting to impasse that Amax accept an agreement which included the work jurisdiction clause.

6. The alleged refusal to meet and bargain

The complaint alleges that Respondents refused to meet and bargain with Amax from approximately Janu-

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the contracting out of the transportation of coal and the repair and maintenance work. However, the question of whether the other portions of Article II which are incorporated into the work jurisdiction clause violate Section 8(e) was alleged in the complaint. In other words, the question of whether the work jurisdiction clause is proscribed by Section 8(e) by its incorporation of the "leasing-licensing out clause" and the construction clause is inextricably related to the other allegations of the complaint, and the matter was fully litigated.

ary 6, 1975 until February 3, 1975, thus violating Section 8(b)(3) of the Act. The pertinent facts are briefly summarized.

The collective-bargaining agreement covering the Belle Ayr Mine, as extended by the UMWA, was scheduled to terminate January 12, 1975, and, absent a new agreement, the employees were scheduled to strike. The negotiations for a successor agreement were delayed, as described *supra,* by the pendency of an unresolved question concerning representation and by the discussions between the parties about the UMWA's request that Amax designate the Peabody Group as its bargaining representative. I have found, *supra,* that Amax did not designate the Peabody Group as its representative for the purposes of collective bargaining. Rather, on December 17, 1974, as found *supra,* Amax told the UMWA it intended to bargain separately, not through the Peabody Group, for a contract covering the Belle Ayr Mine. The next day, by letter described *supra,* Amax in effect requested the UMWA to commence negotiations with Amax for such a contract. The UMWA refused to meet with Amax for this purpose, taking the position that Amax had designated the Peabody Group as its collective-bargaining representative and was bound by the terms of any collective-bargaining agreement negotiated between the UMWA and the Peabody Group.[92] Not until February 3, 1975, did the UMWA accede to Amax's requests for negotiations and meet with its negotiators to commence bargaining for an agreement to cover the

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92. The January 6-7, 1975 meetings between the parties' representatives were regarded by the UMWA as merely informational meetings, not negotiation meetings.

Belle Ayr Mine. In the meantime, the parties' collective-bargaining agreement terminated and the scheduled strike commenced.

The UMWA refused to meet with Amax to negotiate a contract covering the Belle Ayr Mine from about December 18, 1974 until February 3, 1975, a period of about 6 weeks. The UMWA's justification for refusing to negotiate with Amax was not based on a good-faith belief that Amax had designated the Peabody Group as its bargaining representative. If the UMWA ever held such a belief, it was dispelled by Amax's unambiguous assertion made on December 17, 1974, that it intended to bargain separately, not through the Peabody Group, for a contract covering the Belle Ayr Mine. In addition, the next day, Amax by letter in effect asked that negotiations for such a contract commence between the parties. Nonetheless, the UMWA refused to negotiate with Amax, thus displaying a singular disregard for its legal duty to meet with Amax for the purpose of negotiating the terms of a contract for the Belle Ayr Mine. The fact that the UMWA eventually commenced these negotiations on February 3, 1975, under pressure from the Board, does not minimize the seriousness of the misconduct or otherwise remove the stigma of illegality. The refusal to negotiate took place at perhaps the most critical period during contract negotiations—just prior to the scheduled termination of the current contract which the parties knew would result in a strike absent a new agreement—when the parties normally are expected to make substantial progress in reaching agreement. Under the circumstances, it is extremely doubtful that the UMWA can ever undo the damage to the state of negotiations that its refusal to meet, by its nature, was calculated to create.

Based on the foregoing, I find that Respondents from on or about December 18, 1974, until February 3, 1975, refused to meet for the purpose of negotiating a collective-bargaining agreement covering the Belle Ayr Mine with representatives of Amax, thereby violating Section 8(b)(3) of the Act.

7. *The alleged overall failure to bargain in good faith*

The amended complaint charges the UMWA with an overall failure to bargain in good faith. The UMWA, as an affirmative defense to this allegation and to the allegation that it impermissibly bargained to an impasse over nonmandatory and illegal bargaining subjects, contends that Amax engaged in a course of overall bad-faith bargaining.[93] Guided by the applicable principles of law, set forth below, I am of the opinion that neither party engaged in a course of overall bad-faith bargaining.

a. *The applicable principles of law*

The duty to bargain collectively, which an employer and the duly-designated representative of his employees owe to one another under Section 8(b)(3) and 8(a)(5) of the Act, is defined in Section 8(d) of the Act as "the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either

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93. The law is settled that where one of the parties to collective-bargaining negotiations bargins in bad faith, it is impossible to test the good faith of the other party and, likewise, it is impossible to conclude the parties bargained to an impasse. *Times Publishing Company*, 72 NLRB 676, 682; *N.L.R.B.* v. *Big Three Industries, Inc.*, 497 F.2d 43 (C.A. 5).

party to agree to a proposal or require the making of a concession. . . ." This statutory requirement of good faith "can have meaning only in its application to the particular facts of a particular case." *N.L.R.B.* v. *American National Insurance Co.,* 343 U.S. 395, 410. Ultimately, the question of whether a party has conducted his negotiations in good faith involves a finding of motive or state of mind which must be inferred from the evidence viewed as an integrated whole, or as one Court has stated: "based on the overall conduct of the party charged." *N.L.R.B.* v. *General Electric Co.,* 418 F.2d 736, 756 (C.A. 2). No party is required to make concessions, no one need yield any position fairly maintained and "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American National Insurance Co., supra,* 343 U.S. at 404. On the other hand, "[c]ollective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract"; though "the parties need not contract on any specific terms . . . they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *N.L.R.B.* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 485-486. Similarly, in *N.L.R.B.* v. *Katz,* 369 U.S. 736, 747, the Court held that the parties must refrain not only from behavior "which reflects a cast of mind against reaching agreement," but also from behavior "which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion." In other words, "good faith bargaining must be evinced by more than super-

ficial efforts to negotiate a wage agreement. Good faith means sincerity, candor, and a willingness to negotiate toward the possibility of effecting compromises." *N.L.R.B.* v. *Generac Corporation,* 354 F.2d 625, 628 (C.A. 7).

b. *The UMWA's alleged failure to bargain in good faith*

The UMWA, for the sake of bargaining convenience, wanted all western sub-bituminous and lignite coal operators, whose employees it represented, to bargain through one employer group. In order to further this objective, the UMWA, as found supra, used a tactic proscribed by Section 8(b)(1)(B) of the Act and, when Amax failed to succumb, the UMWA then, in violation of Section 8(b)(3) of the Act, as found *supra,* refused to meet and negotiate. The UMWA commenced to bargain only when threatened by the Board's General Counsel with a court injunction. But it does not automatically follow that the UMWA sat down at the bargaining table and bargained in bad faith. The illegal conduct which was a prelude to the negotiations, however, has made me especially critical in evaluating the UMWA's bargaining conduct.

The Charging Party contends that from the start of the negotiations on February 3, 1975 through February 26, 1975, the date the UMWA offered the Western Agreement as its contract proposal, the UMWA was not bargaining in good faith but was merely going through the motions until it reached a Western Agreement with the Peabody Group. I am not convinced this was the case. There is no evidence that during this period or thereafter, the UMWA's representatives either at or away from the bargaining table voiced statements or engaged in other conduct which shows the UMWA was stalling

Amax until the negotiations with the Peabody Group concluded. To the contrary, the UMWA's negotiators informed Amax that the UMWA intended to negotiate and reach agreement with either Amax or the Peabody Group or P & M, depending upon which one offered the better agreement and this agreement would serve as a pattern agreement for the western coal operators whose employees were represented by the UMWA. The fact that the UMWA during this stage of the negotiations drove a hard bargain and sought contractual uniformity does not make out a case of bad-faith bargaining. There is not statutory requirement that a union or employer make concessions to demonstrate its good faith. *N.L.R.B.* v. *American National Insurance Co., supra,* 343 U.S. at 404. See, also, *N.L.R.B.* v. *General Electric Company,* 418 F.2d 736, 758 (C.A. 2) ("[T]he absence of concessions would not prove bad faith, their presence would . . . raise a strong inference of good faith"). Moreover, the UMWA's negotiators, as fully described *supra,* during the meetings held in February 1975 indicated a willingness to compromise in several areas. And, regarding the UMWA's demand for contract uniformity, the Supreme Court has recognized "that a legitimate aim of any national labor organization is to obtain uniformity of labor standards . . ." and "a union may adopt a uniform wage policy and seek vigorously to implement it. . . ." *United Mine Workers* v. *Pennington,* 381 U.S. 657, 666, footnote 2.

Likewise, I am not persuaded that following the culmination of negotiations between the UMWA and the Peabody Group which resulted in the so-called Western Agreement, the UMWA bargained in bad faith in that, as alleged in the complaint, it "exhibited a predetermined resolve not to agree to any proposal but [its]

own." Here, the Charging Party and the General Counsel challenge the legality of the UMWA's historical practice of demanding contract uniformity, as it was applied in this particular case. The Supreme Court in *Pennington, supra,* has recognized the UMWA has a legitimate aim to obtain "uniformity of labor standards." But neither *Pennington* nor any other court or Board decision stands for the proposition that a labor organization in pursuit of its legitimate air of maintaining uniform labor standards may violate important public policies reflected in the National Labor Relations Act. Obviously, all union or employer policies, regardless of their legitimacy, are circumscribed by the statutory duty to bargain in good faith. In the instant case, while the UMWA has the right to consider and weigh the impact of any settlement in the appropriate unit on the employees outside the unit, it could not in this respect bargain from "a fixed inflexible position . . . rigidly unwilling to consider seriously any possible alternatives to its proposal." *Local Union No. 103 Ornamental Iron Workers,* 190 NLRB 741, 742, enfd. on this point, 465 F.2d 327, 334-335 (C.A. 7). In other words, the efforts of the UMWA to obtain uniform working conditions among the western coal producers, whose employees it represents, is limited by its statutory duty to bargain in good faith.

The record does not establish that the UMWA, in demanding that Amax sign the Western Agreement, pursued its policy of contract uniformity with a closed mind or from a fixed inflexible position or was rigidly unwilling to consider seriously any possible alternatives to the Western Agreement. Quite the contrary, on March 4 and March 7, 1975, the UMWA's negotiators indicated to Amax the UMWA was willing to deviate from the terms

of the Western Agreement to take into account any special circumstances that existed at the Belle Ayr Mine. On June 16, 1975, the UMWA's spokesperson, Yablonski, informed Amax's representative, Sonnemann, that the UMWA in effect was willing to deviate from the terms of the Western Agreement and make concessions in order to break the bargaining deadlock. Thereafter, on July 1, 1975, and again on November 14, 1975, the UMWA transmitted comprehensive contract proposals to Amax which deviated substantially from the Western Agreement and which offered numerous and substantial concessions. Further evidence that the UMWA did not negotiate with a mined closed to accepting nothing but the Western Agreement is shown by the collective-bargaining agreements, which deviated significantly from the Western Agreement, which the UMWA reached with western coal operators P & M on or about April 28, 1975, and North American Coal Company on or about June 6, 1975. Under all of these circumstances, I find the UMWA's demand that Amax accept the terms of the Western Agreement, a demand made pursuant to the UMWA's legitimate historical efforts to maintain uniform working conditions in the coal industry, did not constitute bad-faith bargaining in violation of Section 8(b)(3) of the Act.

Likewise, the Charging Party's contention that the UMWA's conduct of breaking off negotiations in August 1975, for approximately 2 months, supports an inference of bad-faith bargaining is without merit where, as here, the record establishes the parties had bargained to an impasse. The UMWA's July 1, 1975 contract proposal made a number of concessions and, as such, broke the prior bargaining impasse. Thereafter, negotiating meetings were held on July 21-22, 1975, and August 7-8, 1975, with, as fully described *supra,* virtually no movement on

the part of Amax. It was at this point the UMWA notified Amax that, due to the lack of substantial bargaining movement by Amax in response to the Union's July 1 contract proposal, the UMWA viewed further negotiations as a waste of time. In reply, Amax stated it was prepared to continue to bargain but offered no concessions and took the position that the UMWA's July 1 contract proposal contained nothing of substance which warranted concessions. Under these circumstances, I am of the view that the assessment of the UMWA that further bargaining, at that time, would have been futile was correct. In short, the negotiations once again had reached a point of impasse.

I also reject the General Counsel's contention the record establishes that the UMWA bypassed the negotiators Amax selected and instead bargained with other company officials. This contention, which borders on the frivolous, rests upon the following evidence: (1) Hollie Hopper, Amax's president who was not a member of the Company's negotiating team, was present at the March 4, 1975 negotiation meeting. His presence was arranged by the FMCS after Yablonski suggested it might be helpful to have a senior corporate official present at the negotiations. (2) On May 30, 1975, UMWA President Miller wrote the president of Amax, Inc., Amax's parent, and forwarded a courtesy copy of the letter to Amax's board of directors. Miller presented the UMWA's version of the labor dispute and set forth the UMWA's position about the issues which divided the parties. The letter ended, "I thank you for your willingness to hear our views, and I hope to hear yours." (3) On June 16, 1975, Yablonski met with Sonnemann, an upper echelon Amax, Inc. official who normally was not a member of the Company's negotiating team. This meeting was arranged

by the FMCS after Yablonski mentioned that Sonnemann's presence at the negotiation meeting held on May 28, 1975, was very helpful and his presence at future meetings might help the parties reach agreement. There is no evidence that Yablonski requested the FMCS to arrange for Sonnemann and himself to meet outside the presence of the Company's negotiating team. (4) On July 22, 1975, UMWA's representatives attended a special meeting of Amax's stockholders where the UMWA representatives presented the Union's side of the labor dispute to the corporate officials and shareholders. In sum, there is no evidence that the UMWA by means of coercion or in any other manner attempted to dictate to Amax which company officials should represent it at the bargaining table or otherwise attempted to bypass the Company's chosen negotiators and bargain with other company officials.

The contention of the General Counsel and the Charging Party that the UMWA, to support its position in its labor dispute with Amax, encouraged the miners represented by the UMWA at Amax's midwestern mines in April 1975 to strike, even if true, is insufficient to support an inference that the UMWA was engaged in overall bad-faith bargaining. See *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO,* 361 U.S. 477. In any event, the record fails to establish the UMWA's responsibility for the strike. The sole evidence attributing these strikes to the UMWA consists of remarks made by UMWA official Marketti and UMWA District Representatives Henry and Gibson as follows: (1) on January 7, 1975, Marketti warned Amax's negotiators that if no contract was reached by January 12, 1975, the UMWA would strike the Belle Ayr Mine and Amax could expect to have problems everywhere. This remark which on its

face is ambiguous cannot be construed as a union threat to strike Amax's midwestern mines, especially in view of the well known proclivity of the members of the UMWA to engage in unauthorized strikes in support of their fellow members at other mines. (2) On April 7-8, 1975, Henry in conversations with Frank Sarno, Amax's manager of labor relations, indicated that UMWA members who had struck Amax had told Henry they were upset over the Company's failure to sign a contract covering the Belle Ayr Mine. Henry told Sarno he could not understand why Amax would not sign a contract similar to the one signed by the Peabody Group and, with respect to the strikers, remarked that even though he was having difficulty speaking to them, he would do what he could to get them back to work. (3) Gibson, at about the same time, told Sarno that he would do all he could to get the UMWA members who were on strike back to work, but would have an easier time convincing them to return if Amax would sign the Western Agreement. Assuming, *arguendo,* Henry and Gibson are agents of the UMWA, their above-described remarks are insufficient to attribute responsibility for the strikes at the Amax's midwestern mines to the UMWA.[94]

I also have rejected as a matter of law the contention that the conduct of the UMWA in encouraging the miners it represents at Amax's midwestern mines to refuse to perform work assignments supports an inference that the UMWA was engaged in overall bad-faith bargaining. See *N.L.R.B.* v. *Insurance Agents' Interna-*

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94. Only some of Amax's midwestern mines, whose employees are represented by the UMWA, were struck by their employees and the strikes occurred during different days in April 1975 and lasted for only 1 or 2 days, which hardly has the earmarks of a UMWA effort.

tional Union, AFL-CIO, 361 U.S. 477. In any event, the course of economic conduct which the UMWA urged upon its midwestern members employed by Amax was protected by Section 7 of the Act. In June 1975, the UMWA asked its members employed at Amax's several midwestern mines, represented by the UMWA, to support their "brothers" employed at the Belle Ayr Mine by working "by the letter of the contract and no more." The UMWA specifically asked its members to decline to perform work requests which they had the right to refuse under the terms of the governing collective-bargaining agreement, i.e., working overtime or on holidays. The sole evidence of any such refusal to perform services involves two mines where the employees refused to work Sunday, an assignment they are not required by the contract to accept. In sum, the economic activities which the UMWA urged upon its midwestern members employed by Amax involved concerted activities sanctioned by Section 7 of the Act rather than conduct in derogation of a collective-bargaining agreement or otherwise unprotected or illegal.

The fact that the UMWA violated the Act by insisting to impasse that Amax agree to contract provisions containing nonmandatory and illegal bargaining subjects, and further violated the Act by striking Amax for an object of securing a contract which included illegal provisions, does not support an inference that the UMWA was engaged in overall bad-faith bargaining. In the case of each nonmandatory and illegal contract provision questioned in this proceeding, except for one, the UMWA eventually yielded to the Company's objections and deleted the offending provision from its contract

proposal.[95] The one clause which it did not delete, the construction clause, was previously included in the old contract between Amax and the UMWA covering the Belle Ayr Mine and, as fully described *supra,* although objecting to its inclusion in the new agreement, Amax continued to include the clause, insofar as it violates Section 8(e), in its own contract proposal. There is no evidence that Respondents' position on the construction clause served to frustrate collective bargaining on other issues, nor is there evidence that the UMWA from July 1, 1975, onward indicated that this clause was one of the items it had to have in an agreement. Indeed, there is no evidence the UMWA from July 1, 1975, onward indicated that any of the contract provisions containing nonmandatory or illegal subject matter, which were still on the bargaining table, was a necessity for a collective-bargaining agreement. In these circumstances, I am of the view that, although the UMWA violated Section 8(b)(3) of the Act and Section 8(b)(4)(A) of the Act by insisting and striking over several of the contract clauses in dispute herein, its conduct in this respect is not indicative of an overall bad-faith approach to the contract negotiations.

Last, but very troublesome, is the question of whether the conduct of the UMWA in initiating litigation and investigation of Amax by the Federal Government charging it with violating the Federal antitrust

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95. The contract provisions offered by the UMWA which are not in question in this proceeding but which the Charging Party, as fully discussed *supra,* claims are nonmandatory bargaining subjects—the exemptions clause, the 1950 pension trust, and the status of Local 1854 as a signatory to the contract—were also eventually deleted by the UMWA from its contract proposal.

laws is sufficient to support a finding of overall failure of good-faith bargaining. The evidence concerning this contention is briefly summarized. In the 3rd week of July 1975, the UMWA, as fully described *supra,* charged Amax with violating the Federal antitrust laws in several different respects and threatened that if Amax did not enter into a collective-bargaining agreement with the UMWA by noontime of July 22, 1975, the UMWA would file lawsuits and initiate investigations by the responsible Federal agencies, and publicize Amax's alleged misconduct. No agreement was reached by the deadline. The UMWA, as it threatened, filed a complaint with the Federal Trade Commission, challenging the purchase of 20 percent of Amax's outstanding common stock by the Standard Oil Company of California (SOCC) and filed additional charges with the FTC, alleging that Amax had violated the Federal antitrust laws in several other respects. The same day the UMWA issued a press release announcing to the public that it had filed the above-described complaint with the FTC and that it had also requested the U.S. Senate to investigate the stock transaction involved. In addition, the press release gave the public the UMWA's version of its labor dispute with Amax and further stated: "Cal Standard [SOCC] is bankrolling Amax's attempt to break the UMWA in the West . . . the Cal Standard/Amax trust would rip off the American consumer while denying Wyoming coal miners their union rights." In addition, UMWA representatives picketed the special stockholders' meeting held by Amax during the afternoon of July 22, 1975, and distributed to the public and to Amax's shareholders and officials copies of the aforesaid news release and leaflets which presented the UMWA's version of its labor dispute with Amax.

To recapitulate, the UMWA attempted to force Amax to enter into a collective-bargaining agreement by threatening to initiate legal proceedings against Amax with the FTC and other government agencies charging it with violating the Federal antitrust laws and threatened to publicize Amax's alleged misconduct. When Amax did not succumb, the UMWA went ahead and engaged in the threatened conduct. This conduct, by the UMWA, which was completely unrelated to the labor dispute between Amax and the UMWA, in my opinion, was reprehensible and is the type of behavior which directly obstructs or inhibits the actual process of discussion at the bargaining table. Nevertheless, the fact that the type of harassment involved herein is personally reprehensible to either an Administrative Law Judge, or the members of the Board, or a court, and is calculated to disrupt the bargaining process in the sense that it will poison the bargaining atmosphere, does not mean that such a tactic is inconsistent with the UMWA's bargaining duty under Section 8(b)(3) of the Act.

In the *Insurance Agents'* case,[96] the Supreme Court held that the harassing tactics which accompanied bargaining negotiations did not furnish a proper basis for finding that the union failed in its statutory duty to bargain in good faith.[97] "At the present statutory stage of

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96. *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO,* 361 U.S. 477 (1960).

97. The union's conduct consisted of successive directives pursuant to which its members refused to write new business or to remain at work during customary hours; engaged in picketing and mass demonstrations; solicited customers' signatures on petitions; refused to attend business conferences and to make required reports; and engaged in other activities which likewise tended to disrupt and curtail the employers' business.

our national labor policy," the Court pointed out, "two factors—necessity for good faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side." *Id.* at 489. According to the Court, the scope of Section 8(b)(3), and the limiting definition of the statutory duty in Section 8(d) of the Act, precludes the Board from "inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of good faith negotiations." *Id.* at 490. If the Board could regulate what economic weapons may be used as part of collective bargaining, the Court stated, it would be in a position to exercise considerable influence upon the substantive terms under negotiations. *Id.* at 490. The Court also held that the Board's refusal-to-bargain finding was not strengthened by the fact that the union's conduct may not have been protected concerted activity, or may not have been time-honored or may deserve public condemnation. *Id.* at 495-496. The Court found no indication "that Congress had put it to the Board to define through its processes what economic sanctions might be permitted negotiating parties in an 'ideal' for 'balanced' state of collective bargaining." *Id.* at 499-500.

Although this matter is a troublesome one, I believe the tactic in question here is covered by the broad language of *Insurance Agents',* therefore, I find it does not support an inference that the UMWA was engaged in bad-faith bargaining.

Based on the foregoing, and the entire record, I find that the UMWA's bargaining stance and conduct, *con-*

sidered in its totality, **does not establish a case of overall bad-faith bargaining.[98] Accordingly, I shall recommend that this portion of the complaint be dismissed.**

In so concluding, I have considered the Charging Party's argument that the other unfair labor practices found herein necessarily demonstrate that the UMWA engaged in a course of overall bad-faith bargaining. While not minimizing the nature and extent of the unfair labor practices found herein, I am not persuaded that, considered in the totality of the circumstances, they make out a case of bad-faith bargaining. I have explained, *supra,* why the UMWA's impermissible conduct connected with the contract proposals containing nonmandatory and illegal provisions does not support an inference that the UMWA engaged in overall bad-faith bargaining. The failure of the UMWA to comply with the Section 8(d)(3) notice requirements is not sufficiently related to the bargaining process itself or to the UMWA's state of mind so as to cast even the slightest doubt about its negotiating conduct. And, although the other illegal conduct which took place prior to the start of the negotiations has made me consider carefully the UMWA's bargaining table conduct, I am convinced that, in the circumstances of this case, this misconduct is insufficient either by itself or coupled with the UMWA's other conduct, both at and away from the bargaining table, so as to taint the UMWA's subsequent entire course of bargaining.

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98. I have considered the cases relied upon by the General Counsel and the Charging Party, including *N.L.R.B.* v. *General Electric Company,* 418 F.2d 736 (C.A. 2), and am of the opinion they are factually distinguishable in significant respects.

c. *Amax's alleged failure to bargain in good faith*

Amax's bargaining conduct up through the UMWA contract proposal of July 1, 1975, contains very few of the elements customarily associated with bad-faith bargaining. Amax was the one that took the initiative in pressing for negotiating meetings in the face of the UMWA's unlawful refusal to meet and negotiate. After negotiations started on February 3, 1975, Amax during the period ending with its contract proposal of March 14, 1975, made a number of bargaining concessions. In sharp contrast, the UMWA, with the negotiation of the Western Agreement, indicated in effect it would accept nothing less than a contract identical to the Western Agreement.

The UMWA argues that during the negotiating period ending July 1, 1975, Amax's bad faith was manifested by the following conduct: (1) "Patently unreasonable proposals", (2) proposals which deleted or significantly modified provisions included in the parties' old collective-bargaining agreement; and (3) Amax's package proposal of March 14, 1975, was offered under circumstances which indicate it was calculated to foreclose future negotiations.

Regarding (1), this is definitely not a situation where an employer has formulated and insisted on contract terms which it "must have known had not the slightest chance of being accepted by a self-respecting union." *N.L.R.B.* v. *Reed Prince Mfg. Co.*, 205 F.2d 131, 139-140 (C.A. 1). A review of the provisions included in Amax's several contract proposals does not support this contention. I recognize the UMWA sincerely believed that some of the Company's proposals would, if accepted, prove disastrous to the UMWA and the employees it

represented but, judged objectively, the separate provisions of Amax's several proposals, together or separately, cannot be characterized as "patently unreasonable." Moreover, there is no indication, other than in connection with the proposed express no-strike clause, discussed *infra,* that Amax was insisting it absolutely needed the so-called "patently unreasonable" provisions in a contract. There is no evidence Amax's position on these provisions was not negotiable.

Regarding (2), I attribute no particular significance to the fact that several of the provisions included in the Company's contract proposal represent a departure from the corresponding provisions in the old collective-bargaining agreement covering the Belle Ayr Mine which, if accepted, would constitute taking a step backward for the UMWA. In order to understand the Company's motivation in this regard, it is necessary to appreciate the fact that the Belle Ayr Mine only opened for production in 1972, and it is Amax's only mine in the western part of the country. When the mine started to operate in 1972, the National Bituminous Coal Wage Agreement of 1971 was already negotiated and covered Amax's several midwestern mines so, without any negotiation, Amax accepted the terms embodied in this agreement—except for the contributions paid into the health and retirement program which differ for western mines—for the Belle Ayr Mine. But, inasmuch as its midwestern mines are bituminous below the surface mines, whereas the Belle Ayr Mine is an open surface sub-bituminous and lignite mine, whose production capacity is substantially greater than any of the midwestern mines, Amax decided to negotiate a new contract for the Belle Ayr Mine which would modify the old agreement in a number of respects. As a matter of fact, the UMWA, itself,

recognized that some of the provisions of the old agreement were not suitable for the Belle Ayr Mine and requested changes in the terms of the old contract. I recognize that a number of departures from the old contract proposed by the Company (i.e., elimination of dues checkoff, significant modification of the seniority provisions and a new health and retirement program) were calculated to lead to strong UMWA opposition inasmuch as no union appreciates being asked to give up something already secured through past negotiation. Nonetheless, I am convinced that the Company, by proposing that the recently expired contract be substantially modified was not motivated by any desire to obstruct agreement, rather, for the legitimate reasons described *supra,* it believed it was essential that it negotiate an agreement for its western mine that differed from the one covering its midwestern mines.

Regarding (3), the Company on Friday, March 14, 1975, without warning submitted a "final" contract offer which made numerous and significant concessions. Amax told the UMWA that this offer was a package which the UMWA had until Monday, March 17, to accept or reject and, if it was rejected, its terms would be implemented and the Belle Ayr Mine reopened.[99] The UMWA urges that the abruptness of this offer and the lack of time the UMWA was given to study and consider it supports an inference that Amax was not bargaining in good faith. I do not agree. As I have found at footnote 28, *supra,* virtually each provision included in the March 14 package had previously been considered by the UMWA. In addition, there is insufficient evidence that,

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99. The mine had been shut since the start of the strike, January 12, 1975.

if a request for more time had been made on March 14, Amax would have refused to grant the UMWA additional time to consider the contract proposal. I realize that on Monday, March 17, Payne refused Edelman's request for more time to consider the proposal but, under the circumstances, this refusal was not unreasonable. Edelman gave Payne no indication that the UMWA was favorably disposed toward the offer but, quite the opposite, on Friday, March 14, during their discussion about the offer, Edelman indicated to Payne that the package was unaceptable to the UMWA because it lacked the UMWA's health and retirement program and an expiration date in common with the Western Agreement. Also, the subsequent course of the negotiations indicates that at this stage of the bargaining the UMWA did not have any reasonable expectation of accepting the Company's March 14 offer. Thus, the UMWA did not waiver from its demand that Amax agree to the terms of the Western Agreement until the Edelman-Sonnemann meeting of June 16, 1975, which resulted in the UMWA's July 1, 1975 contract proposal.[100] These

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100. In so concluding, I have considered that the UMWA did indicate it was willing to diverge from the terms of the Western Agreement by entering into a memorandum of understanding which would (1) clarify the intent of certain provisions and (2) modify the agreement's terms in those instances where Amax was able to demonstrate that the peculiar nature of its operation necessitated deviations, and that on March 7, Payne and Edelman discussed the content of such a memorandum. Nonetheless, I am convinced that, viewed realistically, the UMWA, until it changed its bargaining position at the June 16 Sonnemann-Edelman meeting and its July 1 contract proposal, for all practical purposes was demanding that Amax accept the terms contained in the Western Agreement.

circumstances—the UMWA's uncompromising insistence before and after the March 14 contract offer that Amax accept the Western Agreement, its indication on March 14 that Amax's offer was not acceptable—coupled with the UMWA's failure to accept the proposal, convince me that on March 17, 1975, a bargaining impasse existed, thus allowing Amax to implement the terms of the March 14 contract proposal.

In concluding that Amax's handling of its March 14 contract proposal is not indicative of bad-faith bargaining and its implementation of the proposal did not constitute illegal unilateral conduct, I have considered the UMWA's further argument that it was not given an opportunity to intelligently consider the retirement program included in Amax's March 14 offer inasmuch as it was not furnished the program's trust documents. I reject this contention, for, as explained to Edelman on March 14 by Amax's lawyer, Gruender, the reason that no trust documents were included with the proposal was that none existed because it was too impractical and expensive to prepare such documents in advance of the UMWA's agreement, in principle, that the retirement program incorporated in the proposal was acceptable. This does not mean the UMWA was being forced to accept something sight unseen, for I am convinced that the provisions pertaining to the retirement program incorporated in the March 14 proposal were sufficient to enable the UMWA, as proposed by Gruender, to conclude whether it could accept the retirement program *on principle*. In any event, the record demonstrates the Amax's failure to furnish the UMWA with the trust documents for its proposed retirement program had absolutely no bearing upon the UMWA's bargaining position. Thus, when the March 14 offer was first proposed, Edelman

informed Amax's representatives that the UMWA would not accept a contract which did not include the UMWA's health and retirement program, which statement was reiterated by Yablonski to Amax's negotiators at the meeting of May 28, 1975.

Following the Company's March 14 offer, and its implementation, negotiations remained deadlocked until July 1, 1975, as neither party budged from their respective positions.

In sum, the evidence shows that the Company, during the portion of the bargaining ending July 1, 1975, made every effort to reach agreement. It presented comprehensive counterproposals and made numerous concessions. The stumbling block to agreement was not bad faith on the Company's part, but rather its firm opposition to the UMWA's unyielding demand that it accept the terms of the Western Agreement.

Likewise, the record does not establish Amax was guilty of bad-faith bargaining during the remainder of the negotiations. The UMWA, as found *supra,* in June 1975 indicated to Amax it was prepared to offer concessions to break the bargaining deadlock and, on July 1, 1975, offered a new contract proposal which offered concessions and deviated from the Western Agreement. In the subsequent negotiating meetings, Amax agreed to only two of the disputed matters contained in the July 1 offer. Thereafter, in August 1975, as found *supra,* the bargaining once again reached the point of impasse and the UMWA broke off negotiations. Upon the resumption of negotiations, in October 1975, the UMWA indicated to Amax it was prepared to make further concessions to break the deadlock and, on November 14, 1975, offered a new contract proposal with addi-

tional concessions. In return, Amax failed to offer significant concessions. To the contrary, during October, November and December 1975, Amax withdrew one provision which the parties had tentatively agreed to in earlier bargaining;[101] injected into the bargaining for the first time proposals which it knew the UMWA would view with distaste;[102] and either withdrew or modified proposals after the UMWA had indicated their acceptance.[103]

The ultimate stiffening of Amax's approach to bargaining, as set forth above, is not evidence that Amax was bargaining in bad faith. Rather, the record indicates that this change in company tactic was caused by the UMWA's ineffectual strike, which both exposed the UMWA's inability to exert economic pressure and weakened its bargaining power. Understandably then, the Company after it resumed operations made comparatively few concessions and elected to stand essentially on its March 14, 1975 offer and, as the months passed, withdrew certain proposals and interjected new proposals which it believed were to its advantage. In this regard, I think the language of the Court in *N.L.R.B.* v. *Alva Allen Industries, Inc.*, 369 F.2d 310, 318 (C.A. 8), is particularly appropriate:

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101. A vacation schedule proposal.

102. An express no-strike clause as well as a provision that an employee's first five absences during a year be charged to personal or sick leave.

103. Loading and processing of previously mined and stockpiled coal to fill out unit trains; construction clause; regular overtime for military duty and birthday holiday leave; and the sharing of idle day work, overtime and premium time.

> In the present case it was apparent to all parties that the Union had lost the economic strike and its position had so deteriorated that it no longer had the strength to deal with the Company on a competitive basis. In such a situation it is only natural that the Company sensing its strong position, will bargain with increasing toughness and will be less inclined to make concessions to the Union. The company had a right to withdraw its proposals of the prior summer and had a right to reject propositions which it felt inimical to its best interests . . . .

See, also, *Caroline Farms Division of Textron, Inc.* v. *N.L.R.B.*, 401 F.2d 205, 211 (C.A. 4); *Warehousemen & Mail Order Employees Local No. 743* v. *N.L.R.B.*, 302 F.2d 865, 868 (C.A.D.C.). Moreover, of the several contract provisions that Amax either modified or withdrew, the record fails to indicate that any one of them involved an item which the parties viewed as particularly significant. And, regarding the two new matters which the Company injected into the negotiations, only one, the demand for an explicit no-strike clause, is of significance. Under the circumstances, I cannot conclude that the Company, in modifying its March 14 contract proposal so as to make it less favorable to the UMWA, was motivated by a desire to obstruct agreement or that it otherwise indicates that the Company was negotiating without a sincere desire to reach agreement.

Based on the foregoing, and the whole record, I find that the evidence in its totality fails to establish that Amax engaged in overall bad-faith bargaining.

8. The responsibility of Local 1854 for the unfair labor practices committed by the UMWA

Respondent Local 1854 is the certified bargaining representative of the employees involved in the instant dispute. The Act requires that the UMWA bargain as an agent on behalf of Local 1854 whereas, here, Amax insisted that Local 1854 be a party to any collective-bargaining agreement. *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Also, the UMWA in its November 14, 1975 contract proposal acknowledged that it was negotiating "on behalf of Local 1854." Also, Local 1854 participated in the unfair labor practices found herein by striking in support of the UMWA's bargaining position and would have received the fruits from the contract negotiations and the illegal activities engaged in by the UMWA. Under these circumstances, whether the UMWA is viewed as acting as Local 1854's agent or whether the UMWA and Local 1854 are viewed as having engaged in a common enterprise, I find that Local 1854 is jointly responsible for the illegal activities found herein.

THE REMEDY

Having found that the Respondents have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Amax Coal Company, a Division of Amax, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Mine Workers of America, Local No. 1854, and United Mine Workers of America, are labor organizations within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Amax Coal Company, at its Belle Ayr Mine near Gillette, Wyoming; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. United Mine Workers of America, Local No. 1854, has been at all times material herein, and is, the exclusive representative of the employees in the aforesaid unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

5. By engaging in a strike for the purpose of forcing Amax to enter into a collective-bargaining agreement containing clauses prohibited by Section 8(e) of the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

6. By engaging in a strike and picketing with an object of forcing or requiring Amax to enter into a collective-bargaining agreement containing clauses prohibited by Section 8(e) of the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

7. By insisting to the point of impasse that Amax accept contract clauses prohibited by Section 8(e) of the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

8. By insisting to the point of impasse that Amax accept contract clauses requiring Amax to bargain with Respondents about the wages and other working conditions of Amax's employees in bargaining units other than the Belle Ayr Mine, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

9. By failing to give notice of the existence of a dispute between it and Amax to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to a strike all the terms and conditions of an existing contract pursuant to 8(d)(4) of the Act, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

10. By failing and refusing to meet and bargain collectively with Amax between December 18, 1974 and February 3, 1975, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

11. By threatening to strike Amax if it did not select another employer as its representative for the purposes of collective bargaining, Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

12. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

13. Respondents have not otherwise violated the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[104]

ORDER

Respondents, United Mine Workers of America, Local No. 1854, and United Mine Workers of America, their officers, agents, and representatives shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amax Coal Company by failing to give notice of the existence of any dispute between it and the Company, involving the bargaining unit described hereinabove, to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of any existing contract pursuant to Section 8(d)(4) of the Act.

(b) Engaging in, calling or causing the employees in the appropriate unit described hereinabove to engage in a strike for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act.

(c) Restraining or coercing the Amax Coal Company in the selection of its representatives for the pur-

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104. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

pose of negotiating a collective-bargaining agreement covering the bargaining unit described hereinabove.

(d) Refusing to bargain collectively by failing and refusing to meet with Amax Coal Company for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described hereinabove.

(e) Refusing to bargain collectively by insisting to the point of impasse that Amax Coal Company accept contract clauses prohibited by Section 8(e) of the Act and by insisting to the point of impasse that Amax Coal Company accept contract clauses requiring it to bargain about the wages and other working conditions of employees in bargaining units other than the unit described hereinabove.

(f) Refusing to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of provisions prohibited by Section 8(e) of the Act in any collective-bargaining agreement covering the employees in the bargaining unit described hereinabove.

(g) Inducing or encouraging any individual employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, or threatening, coercing or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where in either case an object thereof is to force or require Amax Coal Company, in connection with its Belle Ayr Mine, to enter into any contract or agreement prohibited by Section 8(e) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls copies of the attached notice marked "Appendix."[105] Copies of said notice, on forms to be provided by the Regional Director for Region 27, shall, after being duly signed by representatives of Respondents, be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the aforesaid Regional Director for forwarding to Amax Coal Company for information and, if it is willing, for posting by it in all locations where notices to its employees in the unit described hereinabove are customarily posted.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the consolidated amended complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated: March 22, 1977

JERROLD H. SHAPIRO
Administrative Law Judge

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105. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with AMAX COAL COMPANY on behalf of its production and maintenance employees in the Belle Ayr Mine by engaging in, calling or causing the employees to engage in a strike, for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act; by failing and refusing to meet with the Company for the purpose of negotiating a collective-bargaining agreement; by insisting to the point of impasse that the Company accept contract provisions prohibited by Section 8(e) of the Act; by insisting to the point of impasse that the Company accept contract provisions requiring it to bargain about wages and other working conditions for employees employed by the Company in bargaining units other than the Belle Ayr Mine; and by striking the Company for the purpose of forcing it to accept a collective-bargaining agreement containing provisions prohibited by Section 8(e) of the Act.

WE WILL NOT restrain or coerce the AMAX COAL COMPANY in the selection of its representatives for the purpose of negotiating a contract covering the production and maintenance employees employed at its Belle Ayr Mine.

WE WILL NOT induce or encourage employees of AMAX COAL COMPANY's Belle Ayr Mine to refuse to

perform services in the course of their employment or threaten, coerce or restrain by picketing or other means AMAX COAL COMPANY, where an object thereof is forcing or requiring AMAX COAL COMPANY to enter into an agreement which is prohibited by Section 8(e) of the Act.

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854 AND UNITED MINE
WORKERS OF AMERICA
(Labor Organization)

By
(Representative) (Title)

Dated

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721—19th Street, Denver, Colorado 80202, Telephone Number: (303) 837-3551.

APPENDIX B

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA and AMAX COAL COMPANY, A DIVISION OF AMAX, INC.	Cases 27—CB—900 and 27—CC—571

Decision and Order

On March 22, 1977, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the Charging Party and the Respondents filed exceptions and supporting briefs, the General Counsel filed cross-exceptions and a brief in support thereof, the Charging Party filed a reply brief, the Respondents filed an answering brief, and the Secretary of Labor filed an *amicus curiae* brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and

1. The requests for oral argument submitted by the Respondents and the Charging Party are hereby denied as the record, the exceptions, and the briefs adequately set forth the issues and positions of the parties.

2. Subsequent to the issuance of the Administrative Law Judge's Decision herein, the Board issued its Decision in *United Mine Workers of America (Lone Star Steel Company and Surface Industries, Inc.)*, 231 NLRB No. 88 (1977), wherein it found, *inter alia*, that the "successorship clause" at issue in this proceeding did

conclusions[3] of the Administrative Law Judge only to the extent consistent herewith, and to adopt his recommended Order as modified.

1. The General Counsel and the Charging Party contend that the Respondents violated Section 8(b)(1)(B) of the Act by threatening to strike the Charging Party in order to compel it to bargain through a multiemployer association. They additionally contend that the strike that did, in fact, occur herein was motivated by the same object and, therefore, that it was violative

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not fall within the proscription of Sec. 8(e) of the Act. Accordingly, in adopting the Administrative Law Judge's finding regarding that clause, we additionally rely on our Decision in *Lone Star Steel Company, supra.*

In the portion of his Decision entitled "The Joint Western Surface Mining Industry Training Committee" the Administrative Law Judge at times inadvertently referred to art. XV(a) as art. II(a). The Administrative Law Judge's Decision is hereby accordingly amended. 238 NLRB No. 214

3. We adopt the Administrative Law Judge's conclusion in sec. III,C,3,(c) of his Decision that the Union did not violate Sec. 8(b)(3) of the Act with regard to the district agreements contract proposal because, assuming this clause to be a nonmandatory subject of bargaining, the record evidence does not show that Respondent insisted on this issue to the point of impasse.

We adopt the Administrative Law Judge's conclusion contained in sec. III,C,7 (c) of his Decision that the evidence fails to establish that Amax engaged in overall bad-faith bargaining and that the Union's asserted defense on this ground is thus without merit. See *Times Publishing Company,* 72 NLRB 676, 682 (1947). We find it unnecessary, however, to pass on Amax's bargaining posture during October, November, and December 1975, since in the circumstances here the events occurring during this time, whatever their character, could not be viewed as retroactively excusing the

of Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the Act. The Administrative Law Judge concluded that by predicating an extension of the Charging Party's existing contract upon its agreement to enter into multi-employer bargaining, the Respondents implicitly threatened to strike the Charging Party upon the expiration of the then-existing contract. He viewed such conduct as an attempt to coerce the Charging Party in the selection of its collective-bargaining representative and thus

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Respondents' prior unlawful conduct. Since we find it unnecessary to pass on these events we of course decline to consider the applicability of *N.L.R.B.* v. *Alva Allen Industries, Inc.*, 369 F.2d 310 (C.A. 8, 1966), and related cases cited by the Administrative Law Judge.

Although the Administrative Law Judge found that the Respondents' conduct, when viewed as a whole, did not violate its statutory obligation to bargain in good faith, he commented, in sec. 7(b) of his Decision, that the Respondents' conduct in first threatening and later filing a complaint with the Federal Trade Commission, alleging that the Charging Party had violated the anti-trust laws, was "reprehensible" and "the type of conduct which directly obstructs or inhibits the actual process of discussion at the bargaining table." We are unable to agree with such a characterization of the Respondents' conduct and therefore disavow those comments. The Board has consistently held that its enforcement of the Act should accommodate the "right of all persons to litigate their claims in court." See *Glaziers and Glassworkers, Local Union 767 (Sierra Glass Service, Inc.)*, 228 NLRB 35 (1977); *United Aircraft Corporation (Pratt and Whitney Division)*, 192 NLRB 382 (1971); and cases cited therein. We are unable to perceive any legitimate distinction as to why our accommodation of that right should be any different than accommodating the right of parties to file a complaint with another administrative agency.

There is now pending before the Board a petition in Case 27—RC—5342, filed by another labor organiza-

he found that the Respondents had violated the Act as alleged, insofar as the threat was concerned. He further found, however, that the strike which occurred herein on January 12, 1975, was not motivated by a desire to compel the Charging Party to bargain through a multi-employer association and, therefore, he dismissed that portion of the complaint. For the reasons expressed hereinafter, we agree with the Administrative Law Judge that the Respondents violated Section 8(b)(1)(B) of the Act by threatening to strike the Charging Party unless it agreed to bargain through a multiemployer association. Contrary to the Administrative Law Judge, however, we find merit in the position of the General Counsel and the Charging Party that the strike which subsequently occurred was violative of Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the Act.

On November 2, 1974, Arnold Miller, the president of Respondent United Mine Workers of America, hereinafter referred to as the Union, sent identical letters

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tion (New Acme) subsequent to the hearing in this matter. In that case, New Acme seeks to represent the employees at the Belle Ayr Mine and both the Union involved herein and another labor organization (Operating Engineers) have intervened. In the instant case, the Administrative Law Judge's Conclusion of Law 4 provides that the United Mine Workers of America, Local 1854, has been at all times material herein, and is, the exclusive collective-bargaining representative of the employees employed at the Belle Ayr Mine. In view of the pending petition referred to above, however, it is clear that at the present time the question of whether the Union is the exclusive bargaining representative of the aforesaid employees remains unresolved. Accordingly, we have amended Conclusion of Law 4 to provide that at all times material herein the Union has been the exclusive collective-bargaining representative of the employees at the Belle Ayr Mine.

to approximately 12 western coal mine operators, including the Charging Party, with whom the Union had agreements, proposing that they form a multiemployer bargaining association in order to negotiate a single agreement covering those miners. The letter further stated that "contingent upon your assert to our proposal, the UMWA offers to extend the present Agreement with your company for a period of sixty days beyond November 12, 1974."

Four of the employers who were signatories to contracts with the Union—Energy Fuels Corporation, Kemmerer Coal Company, Usibelli Coal Mine, Inc., and the Peabody Coal Company (hereinafter referred to as the Peabody Group)—agreed to bargain as a multiemployer association, provided that each would be able to sign a separate agreement. Thereafter, as promised, the Union granted to each of these employers a 60-day extension of their then-existing agreements. On November 6, 1974, the Charging Party's president, Hopper, replied to the Union's proposal by indicating that a pending representation petition at the Belle Ayr Mine would have to be resolved prior to its taking any action regarding the negotiation of a new agreement.[4] Shortly

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4. On September 12, 1974, the International Union of Progressive Mine Workers filed a representation petition seeking to represent the Charging Party's employees at the Belle Ayr Mine. Shortly thereafter, Respondent United Mine Workers, Local 1854 (hereinafter referred to as Local 1854), intervened in that proceeding.

On November 22, 1974, an election was conducted at the Belle Ayr Mine, in which Local 1854 emerged victorious. Consequently, on December 9, 1974, Local 1854 was certified as the bargaining representative for the production and maintenance employees at the Charging Party's Belle Ayr Mine.

thereafter, Elkins Payne, the Charging Party's vice president of administration and employee relations, essentially reiterated that position in a telephone conversation with Edgar James, an assistant to the Union's president. During this conversation, Payne also indicated that, although the Charging Party would rather bargain independently of the Peabody Group, it nonetheless wished to receive the contract extension that had been granted to the employers who comprised the association. As related by Payne, James' response emphasized that, "[U]nless we [Amax] got in the association, we weren't going to get any extension, and that everybody wanted the extension, but nobody wanted to be in the association." James concluded the conversation, however, by stating that, in view of the pending representation case at the Belle Ayr Mine, he would discuss the matter of an extension with the Union's general counsel.

On November 10, 1974, the Union's president, Miller, notified the Charging Party of the following:

> UMWA unilaterally agrees to extend current collective bargaining agreement covering your Belle Ayr Mine to 12:01 a.m. December 12, 1974.

On November 23, 1974, the day after Local 1854's victory in the election at the Belle Ayr Mine, Payne prepared a draft of a letter to Miller, which indicated that after Local 1854's certification by the Board the Charging Party would be prepared to commence negotiations. In addition the letter stated:

> We have been advised from your office that the U.M.W.A. has offered a further extension of the current agreement to January 12, 1975, provided

we participate in bargaining with other companies under a single agent selected by such companies. Solely in order to expedite the negotiation of an agreement, we are *considering participation* in such as arrangement providing our understanding of your proposal, as related to Amax Coal, is correct. [Emphasis supplied.]

* * * * *

If you agree that our understanding is in accord with your proposal, please sign below and return the copy to me. Upon receipt of confirmation I will contact the designated agent to resolve any other problems which may arise relating to our participation. Due to the time constraints facing us, your immediate response will be greatly appreciated.

Because he was unable to articulate precisely the Charging Party's concern over the amount of influence that it would exert within the Peabody Group, however, Payne did not mail the letter at that time. Instead, he arranged for a meeting to be held between himself and Joseph Yablonski, the Union's general counsel, on November 25, 1974. Also in attendance at that meeting were the Charging Party's president, Hopper, and Edgar James for the Union. At that meeting, Payne indicated that the Charging Party was reluctant to join the Peabody Group because the voting rights of the members would be determined on the basis of the amount of coal being produced at the time negotiations commenced. Since the Charging Party's production was expected to rise appreciably over the term of the contemplated agreement, it was hesitant to agree to such a system. While the Union's representatives indicated that they perceived the legitimacy of the Charging Party's con-

cern, they expressed the view that the Charging Party would have to resolve this problem with the other members of the association. At the conclusion of the meeting, the Charging Party's representatives indicated that, subsequent to the resolution of this issue, they would notify the Union as to whether they would join the Peabody Group. Immediately following this discussion, the Charging Party mailed the letter referred to above. Subsequent to receiving this letter, Miller signed it as requested and notified the Charging Party by telegram that the Respondents would begin negotiations in mid-December 1974, and that the existing agreement at the Belle Ayr Mine was extended until January 12, 1975.

On or about December 10, 1974, Payne telephoned Yablonski and told him that the Charging Party had been unable to resolve its differences with the Peabody Group and consequently that it intended to bargain independently. During the conversation they agreed to meet on December 17, 1974, in order to discuss this matter further. Shortly after the meeting began on that date, Payne reiterated that the Charging Party intended to negotiate its own contract. In addition, Sonnemann, another of the Charging Party's representatives, stated, in unequivocal terms, that the Charging Party was not a member of the Peabody Group. The record reveals that Yablonski did not object to either of those statements. The following day, December 18, 1974, Payne wrote a letter to Yablonski, stating, in part:

> In accordance with our discussion in your office on Tuesday, December 17, 1974, we are confirming our tentative understanding with regard to the forthcoming negotiations between Amax Coal Company and the UMWA regarding a wage agreement cover-

ing production and maintenance employees at our existing Belle Ayr Mine, Gillette, Wyoming.

Shortly afterward, on December 20, 1974, the Union began negotiations with the Peabody Group. On January 6, 1975, representatives from the Union and the Charging Party met to discuss a comprehensive proposal that the Union had prepared pursuant to its preliminary discussions with the Peabody Group. At that meeting, the parties exchanged proposals and then proceeded to devote the majority of the discussion that followed to a review of the Union's contract proposal. At the conclusion of the meeting, the parties agreed to meet again the following evening.

At the start of the meeting held on January 7, 1975, James Marketti, the Union's director of western organizing, who was not present at the previous meeting, informed the Charging Party's representatives that it was not the Union's intention to negotiate a contract covering solely the Belle Ayr Mine and that the Union was meeting with them for informational purposes only. In this regard, he indicated that, insofar as the Union was concerned, the Charging Party was a member of the Peabody Group. Consequently, he stated that the Union would only negotiate with it as a member of that group and that any agreement entered into between the Union and the Peabody Group would bind the Charging Party. He further indicated that if the Union did not reach an agreement with the Peabody Group by January 12, 1975 (the date the agreement at the Belle Ayr Mine had been extended to), the Union would strike the Charging Party, inasmuch as the employees would not work without a contract. In addition, he warned Payne, who was the Charging Party's chief representative at

this meeting, that "If you don't get into this association, you are going to have problems everywhere. You know how coal miners are." When one of the Charging Party's representatives inquired as to whether this remark was intended as a threat to strike the Charging Party's midwestern mines (which were covered by the National Bituminous Coal Wage Agreement of 1974), Michael Trbovich, another member of the Union's negotiating committee, responded by stating, "Come on, Elkins, you have been in this business for how many years. You know exactly what we are talking about." Finally, at the conclusion of the meeting, when the Charging Party's representatives asked if the Union was refusing to bargain with them, the union negotiators essentially reiterated their views with respect to the Charging Party's membership in the Peabody Group. They did agree, however, to notify Payne the following day regarding the possibility of negotiating separately with the Charging Party.

As promised, the following day the Union responded in the form of a letter written by Yablonski. In that letter, which was delivered to Payne, he indicated that the Union adhered to the position that the Charging Party was a member of the Peabody Group, that its attempt at withdrawal was untimely, and that it would therefore be bound by any agreement that the Union negotiated with the Peabody Group. Payne responded by disputing all of the above-stated assertions.

On the evening of January 11, 1975, the Charging Party attempted to avert the strike that the Union had indicated would occur the following day by delivering a new contract proposal to the Union. Although Yablonski accepted the proposal, he advised the Charging Party's

representatives that his acceptance did not "constitute an agreement to bargain separately" and he refused to discuss the proposal at that time. The following day, January 12, 1975, the Union launched a strike against the Charging Party and all the other western coal operators whose employees it represented. On January 15, 1975, the Union temporarily ceased negotiations with the Peabody Group, but continued meeting with the Pittsburgh and Midway Coal Company, an employer who chose to pursue an individual course of bargaining. Shortly thereafter, on January 18, 1975, Payne sent a telegram to the Union's Western Bargaining Council requesting that separate negotiations between the parties begin no later than January 20, 1975. A reply from the Union was never received. Finally, on February 3, 1975, after being notified that the Board's General Counsel intended to issue a complaint in this proceeding, the Union began separate negotiations with the Charging Party.

After a careful review of all the foregoing facts, we find, in agreement with the Administrative Law Judge, that the letter drafted by the Charging Party on November 23, 1974, but not submitted until after the November 25, 1974, meeting with the Union's general counsel, does not indicate the "unequivocal intention to be bound in collective bargaining by group rather than individual action," which the Board requires before it finds that an employer is obligated to accept the results of multi-employer negotiations.[5] On the contrary, we view the

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5. *Custom Color Contractors,* 226 NLRB 851 (1976), enfd. *sub nom. N.L.R.B.* v. *Beckham, Inc.,* 564 F.2d 190 (C.A. 5, 1977); see also *Bill O'Grady Carpet Service, Inc.,* 185 NLRB 587 (1970); *Korner Kafe, Inc.,* 156 NLRB 1157 (1966).

above-mentioned letter, as did the Administrative Law Judge, as predicating the Charging Party's participation in the Peabody Group upon the occurrence of two conditions precedent. The first condition was met when Miller signed and returned the Charging Party's letter of November 23, 1974, and thereby confirmed that the Charging Party's perception of the Union's proposal was correct. However, the second condition—that the Charging Party resolve the question of its status within the Peabody Group—was never met, and the Charging Party promptly notified the Union of that fact on December 10, 1975.

Furthermore, we additionally agree with the Administrative Law Judge's finding that assuming *arguendo,* the Charging Party did, in fact, commit itself to bargain through the Peabody Group, it extricated itself from the obligation to engage in multiemployer bargaining in timely fashion. In arriving at that finding, we note, as did the Administrative Law Judge, that on both December 10 and 17, 1974, the Charging Party's representatives unequivocally expressed its intention to negotiate individually. Within the context of these unambiguous oral assertions, we view the Charging Party's letter of December 18, 1974, which was sent prior to the commencement of the Union's negotiations with the Peabody Group, as constituting "adequate written notice" of withdrawal under the Board's rule in *Retail Associates, Inc.*[6]

After disposing of the threshold question of whether the Charging Party was, in fact, a member of the Peabody Group, the Administrative Law Judge conclud-

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6. 120 NLRB 388 (1958); see also *The Carvel Company,* 226 NLRB 111 (1976).

ed that Miller's letter of November 2, 1974, offering to extend the existing agreement only upon the condition that the Charging Party accede to its request to bargain through a multiemployer association, was an attempt to coerce the Charging Party in its selection of a collective-bargaining representative. Thus, he found the Respondents' conduct violative of Section 8(b)(1)(B) of the Act.[7]

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7. The Administrative Law Judge noted that while, on its face, the language contained in Miller's letter does not constitute restraint or coercion within the meaning of Section 8(b)(1)(B), words that are otherwise permissible may have a coercive effect within the context in which they are utilized. See *Local 901, International Brotherhood of Teamsters, etc. [Editorial El Imperial, Inc.]* v. *Raymond J. Compton, Reg. Dir.*, 291 F.2d 793, 797 (C.A. 1, 1961); see also *Dixisteel Buildings, Inc.*, 186 NLRB 393, 395 (1970). Under the circumstances involved in this case, where the Union has a tradition, embodied within its constitution, of engaging in a work stoppage at the expiration of an agreement, the Administrative Law Judge viewed the letter as a threat to strike the Charging Party immediately upon the termination of the then-existing agreement, unless the Charging Party agreed to bargain through the Peabody Group.

In addition, the Administrative Law Judge found that the 30-day contract extension granted to the Charging Party on November 10, 1974, was insufficient to cure the effects of the above threat. He concluded that the above-noted statements of Edgar James, in a telephone conversation with Payne, immediately prior to the granting of the extension, were "reasonably calculated to lead Amax to believe that the reason its current agreement was extended 30 days was related to the question concerning representation caused by the election petition and that otherwise its failure to join the Peabody Group would have resulted in an immediate strike."

Appendix B.

In agreeing with the Administrative Law Judge that the Respondents violated Section 8(b)(1)(B) of the Act by attempting to coerce the Charging Party in its selection of a collective-bargaining representative, we rely on facts that were found, but not considered by him, and on undenied testimony in the record which, in our view, supports that finding. Specifically, we find persuasive several statements that were made by union representatives at the meeting held on January 7, 1975, and the contents of the letter that Yablonski sent to Payne the following day. As noted above, at the meeting held on that date, Marketti indicated that the Union viewed the Charging Party as a member of the Peabody Group and thus, if the Union did not reach an agreement with that group by January 12, 1975, the Charging Party would be subjected to a strike at its Belle Ayr Mine. In addition, Marketti's statement—"If you don't get into this association, you will have problems everywhere. . . ."—when considered in the context of Trbovich's remarks, can reasonably be interpreted as a threat to strike the Charging Party's midwestern mines, for which an agreement had already been reached. While Yablonski's letter of January 8, 1975, does not contain any explicit references to a strike, by reiterating that the Union considered the Charging Party to be a member of the Peabody Group and expected it to be bound by any agreement that was reached with that group, it is clear that the letter fostered the impression that the Union sanctioned the statements made by its representatives the previous day.

In our opinion, when these additional facts are considered in conjunction with the Union's letter of November 2, 1974, it is evident that the Union sought to dictate to Amax who its collective-bargaining representative

would be. Under the circumstances present herein, we feel that the Union's course of conduct "was designed to exert some restraint or coercion . . . over and above a mere attempt at persuasion in a free market place of ideas."[8] Indeed, by attempting to compel the Charging Party to relinquish its right to negotiate independently and instead negotiate through a multiemployer association, the Union engaged in a classic example of the type of conduct which Congress sought to proscribe in enacting Section 8(b)(1)(B) of the Act.[9] Accordingly, on the basis of all of the foregoing, we find, in agreement with the Administrative Law Judge, that the Respondents violated Section 8(b)(1)(B) of the Act by threatening to strike the Charging Party unless it agreed to bargain through the Peabody Group.

However, contrary to the Administrative Law Judge, we also find that from January 12 to February 3, 1975, the Respondents' strike was motivated *inter alia,* by a desire to compel the Charging Party to bargain as a member of the Peabody Group and, therefore, violated Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the

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8. *Sheet Metal Workers International Association, Local Union No. 59,* 227 NLRB 520 (1976); *International Ladies' Garment Workers' Union, AFL-CIO, et al. (Slate Belt Apparel Contractors Association, Inc.),* 122 NLRB 1390 (1959), enforcement denied 274 F.2d 376 (C.A. 3, 1960); *Paddock Pools of California, Inc. et al.,* 120 NLRB 249 (1958).

9. In explaining this Section, Senator Taft stated: "Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' " II Leg. Hist. 1012 (1947).

Act.[10] In arriving at this finding, we view the strike as being, at least in part, a culmination of the unlawful conduct we have fully detailed above. In this regard, we rely principally upon the fact that on January 7, 1975, a union representative informed the Charging Party that it was required to negotiate as a member of the Peabody Group and that it would be subjected to a strike on January 12, if, prior to that time, the Union had not reached an accord with the negotiators for the Peabody Group. In addition, we also rely on the fact that on January 11, 1975, the day prior to the threatened strike, the Union persisted in its refusal to negotiate separately with the Charging Party and continued to insist that it negotiate through the Peabody Group. Thus, the Charging Party was placed in a position whereby, although it was faced with the threat of an impending strike, it was nevertheless precluded from bargaining with the Union. It is clear, then, that the only way the Charging Party could have hoped to have any input into averting, or limiting the duration of, the strike would have been to waive its statutory right to select its own bargaining representative and acquiesce in the Union's demand to bargain through the Peabody Group.

Unlike the Administrative Law Judge, we also find that the Union's conduct subsequent to the commencement of the strike serves to establish the existence of a

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10. In pertinent part Sec. 8(b)(4)(i) and (ii)(A) of the Act provides: "(b) It shall be an unfair labor practice for a labor organization or its agents—(4)(1) to engage in . . . a strike . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is: (A) forcing or requiring any employer . . . to join any . . . employer organization . . . ."

proscribed objective.[11] In this connection, we note that on January 18, 1975, the Charging Party submitted yet another request for negotiations regarding the Belle Ayr Mine, to which the Union failed to respond. We view such conduct in light of the fact that on January 15, 1975, the Union suspended negotiations with the Peabody Group, citing the slight progress that had been made up until that point, but nonetheless continued to meet with Pittsburgh and Midway Coal Company, another employer who, like the Charging Party, had elected to pursue independent negotiations. Thus, despite the fact that negotiations were stalled with the Peabody Group and even though the Union was continuing its efforts to reach an agreement with another employer which was not a member of the Peabody Group, it nevertheless refused to acknowledge the Charging Party's request to bargain. Under these circumstances, the only inference to be drawn from the Union's conduct is that, during this period, it was continuing its effort to compel the Charging Party to bargain through the Peabody Group. Finally, we note that it was only after learning that a complaint was about to issue in this proceeding that the Union began independent negotiations with the Charging Party on February 3, 1975.

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11. See *Glass Workers Local 1892, Brotherhood of Painters, Paperhangers and Decorators of America, AFL-CIO (Frank J. Rooney, Inc.)*, 141 NLRB 107 (1963), where, in finding a violation of Sec. 8(b)(4)(A) of the Act, the Board reaffirmed the principle first stated in *International Ladies' Garment Workers' Union, AFL-CIO (Coed Collar Company)*, 137 NLRB 1698 (1962), that "Unlawful motivation in picketing situations, as intent in discharge cases . . . must be ascertained from the context of preceding and subsequent as well as attendant circumstances."

It is, of course, true that by launching a strike against all of the western coal operators at the expiration of their existing agreements, the Union was motivated by entirely lawful economic considerations. However, insofar as the strike against the Charging Party was concerned, we are persuaded that the foregoing evidence convincingly demonstrates that it was also motivated by the Union's desire to compel the Charging Party to bargain through the Peabody Group. The fact that one of the objectives of the strike was lawful does not, in any way, diminish the fact that the other objective was unlawful.[12] Accordingly, we find that, from January 12, 1975, to February 3, 1975, the Respondents struck the Charging Party with the objective of forcing it to engage in multiemployer bargaining and, therefore violated Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the Act.[13]

2. The General Counsel and the Charging Party also allege that the Respondents' conduct in insisting to impasse and striking to obtain the Charging Party's participation in the Union's pension and welfare trust

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12. *International Longshoremen's and Warehousemen's Union Local 8; International Longshoremen's and Warehousemen's Union, Local 92; and International Longshoremen's and Warehousemen's Union (General Ore, Inc.),* 126 NLRB 172 (1960).

13. We agree with the finding made by the Administrative Law Judge in sec. III,C,6, of his Decision that the Respondents also violated Sec. 8(b)(3) of the Act by refusing to meet and bargain with the Charging Party, but conclude that the evidence shows that this violation occurred from approximately January 7 to February 3, 1975, and not from December 18, 1974, to February 3, 1975, as found by him.

funds (hereinafter referred to as the trust funds), the management trustee of which is not selected by the Charging Party, is action constituting coercion in the selection of a representative for the purposes of collective bargaining in violation of Section 8(b)(1)(B) and 8(b)(3) of the Act. The Administrative Law Judge concluded, however, that the trust funds' management trustee is not a collective-bargaining representative within the meaning of Section 8(b)(1)(B) of the Act and, therefore, dismissed that portion of the complaint. We agree with the Administrative Law Judge.

The relevant facts, which are more fully set forth in the Administrative Law Judge's Decision, may be briefly summarized as follows:

The trust funds are jointly administered, multiemployer trusts, established pursuant to the dictates of Section 302(c)(5) of the Labor-Management Relations Act. In order to comply with the "equal representation" requirement of that Section, the trust funds are administered by three trustees, one appointed by the Union, one appointed by the participating employers, and a neutral trustee selected by the two other trustees. The provisions of the Union's 1974 "Benefit Plan and Trust" defines the trustees as fiduciaries within the meaning of the Employee Retirement Income Security Act of 1974. In addition, the benefit plan clearly delineates the major eligibility requirements for each category of beneficiaries, the benefit level, and the amount of employer contributions that are to be allocated to the various classes of beneficiaries. Notwithstanding those limits on their authority, however, the trustees are empowered to, *inter alia*: (1) provide health benefits to any participant who is also receiving pension benefits and who "is not

earning more than an amount to be determined by the trustees"; (2) render a final determination as to all issues concerning eligibility for pension benefits; (3) in the event the assets of the 1974 benefit trust become insufficient to pay the scheduled benefits, suspend or reduce the benefits to a level which, in their judgment, can be borne by the assets of said trust; and (4) "determine whether employers have violated their contractual obligations and, if so, to pursue legal remedies on behalf of the beneficiaries."

Within his Decision, the Administrative Law Judge noted initially that the Union's proposal regarding the trust funds, inasmuch as it seeks to require the Charging Party to contribute funds into a health and retirement program for its employees, is undisputably a mandatory subject of bargaining. Then, as noted above, he rejected the contention that, notwithstanding the mandatory nature of the proposal, the Charging Party is immune from economic pressure directed at compelling its participation in the trust funds on the ground that the trustees are collective-bargaining representatives within the meaning of the Act. In so doing, he relied, not only upon the fiduciary obligations imposed on the trustees by the Employee Retirement Income Security Act, but also upon several decisions rendered by various Federal courts, all of which suggest that the trustees of a trust fund established pursuant to Section 302(c)(5) do not possess the attributes of a collective-bargaining representative.

Following the issuance of the Administrative Law Judge's Decision in this case, the Board issued its Decision in *Sheet Metal Workers' International Association and Edward J. Carlough (Central Florida Sheetmetal*

Contractors Association, Inc.).[14] In that case, after carefully considering many of the same principles discussed by the Administrative Law Judge herein, the Board concluded that the trustees of a jointly administered, multiemployer trust fund are solely fiduciaries, owing undivided loyalty to the beneficiaries of such a plan, and are not, therefore, collective-bargaining representatives within the meaning of Section 8(b)(1)(B) of the Act. Accordingly, insofar as it is consistent with our Decision in *Central Florida, supra,* we adopt the Administrative Law Judge's finding herein that the Respondents did not violate Section 8(b)(1)(B) and 8(b)(3) of the Act by insisting to impasse and striking to obtain the Charging Party's participation in the trust funds, which, of necessity, required it to accept a preselected management trustee as its representative in the funds' administration.[15] We shall dismiss, there-

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14. 234 NLRB No. 162 (1978).

15. In adopting the Administrative Law Judge's findings, we do not adopt his analysis of the Board's decisions in *Jacobs Transfer, Inc.,* 227 NLRB 1231 (1977); *L & M Carpet Contractors, Inc.,* 218 NLRB 802 (1975); *United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO, et al. (Fixtures Unlimited),* 213 NLRB 363 (1974), enfd. in part, reversed in relevant part, and modified in part 531 F.2d 424 (C.A. 9, 1976); and *Local 80, Sheet Metal Workers International Association, AFL-CIO, et al. (Turner-Brooks, Inc.),* 161 NLRB 229 (1966).

In all of the above cases, the Board has found the trustees of a trust fund which has been established by a collective-bargaining agreement to be the agents of each of the parties to the collective-bargaining agreement.

The Administrative Law Judge viewed those decisions as implicitly indicating the Board's recognition that the trustees cannot possibly act as the collective-

fore, this portion of the complaint.

3. The General Counsel and the Charging Party further contend that the Respondents violated Section 8(b)(3) of the Act by insisting to impasse upon the "Enabling" and "Application of this Contract to the Employer's Coal Lands" clauses, which they allege to be nonmandatory subjects of bargaining. The Administrative Law Judge concluded that both clauses are, in fact, nonmandatory subjects of bargaining, since, in his view, they seek to require the Charging Party to bargain "on a basis broader than the certified unit." Accordingly, he found that Respondents had violated the Act as alleged. For the reasons expressed hereinafter, we disagree with the findings and conclusions of the Administrative Law Judge.

Briefly, the facts with respect to this issue may be summarized as follows:

On January 6, 1975, the Union included the following two clauses as part of its initial proposal:

Article I, Enabling Clause
This agreement . . . covers the sub-bituminous coal or lignite mines owned or operated by [Amax].

Article II, Application of this Contract to the Employer's Coal Lands.
(f) . . . this agreement covers the operation of all

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bargaining representatives of their appointing parties in administering such a trust fund. However, the issue of the trustees' status as they perform their "discretionary functions in the internal administration of the trust" was not before the Board in those cases and, consequently, we do not rely on them in reaching our decision herein. See *Central Florida, supra* at fn. 30.

> the coal lands, coal producing and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production or use.

At the meeting held on the above date, the Charging Party's representatives objected to both of these clauses on the ground that they encompassed facilities other than the Belle Ayr Mine. In response to these objections, Yablonski, on January 9, 1975, sent a letter to the Charging Party stating, "Your assertion that the UMWA has attempted to bargain for Amax operations other than Belle Ayr is plainly without foundation. The standard UMWA accretion clauses—known as 'Application of contract to coal lands'—merely commits an employer who agrees to it to apply the terms of that agreement to any new mining operations which may be developed during the life of the agreement and the UMWA is either recognized or certified as the collective bargaining representative of that operation." Thereafter, on July 1, 1975, the Union formalized this interpretation by amending the enabling clause to indicate that the agreement was intended to cover other subbituminous or lignite mines owned or operated by the Charging Party "provided that the UMWA is the bargaining representative of the employees at such mines." Similarly, the "Application of this Contract to the Employer's Coal Lands" clause (hereinafter referred to as the application-of-contract clause or the coal lands clause) was amended to provide that the agreement was to be applied only to mines "at which the UMWA is established as the bargaining representative for the employees." Finally, on November 14, 1975, in the face of the Charging Party's adamant

objection to both clauses, the Union deleted the application-of-contract clause and modified the enabling clause so that it clearly applied to only the Belle Ayr Mine. However, in doing so, the Union took the position that the Belle Ayr Mine encompassed all mining that would be undertaken by the Charging Party on its present leases in Campbell County, Wyoming, which at the time of the hearing amounted to several thousand acres.

The Administrative Law Judge viewed the two above-stated proposals as "after acquired or additional facility" clauses, similar to the one involved in *Houston Division of the Kroger Co.*[16] While acknowledging that, in light of the Board's Decision in *Kroger, supra,* such a clause is a valid contractual provision which the parties may voluntarily include in an agreement, he nevertheless concluded that both clauses involved in the instant proceeding are nonmandatory subjects of bargaining. This conclusion was predicated on his determination that the Respondents' objective in demanding the two disputed proposals was to merge the existing unit into an employerwide unit. In the Administrative Law Judge's view, the integrity of the bargaining unit precluded his finding that a contract proposal seeking the enlargement of an existing unit was a mandatory subject of bargaining.

As indicated in footnote 2 above, subsequent to the issuance of the Administrative Law Judge's Decision in this case, the Board issued its Decision in *United Mine Workers of America (Lone Star Steel Company and Surface Industries, Inc.), supra.* In that case, the Board interpreted the application-of-contract clause as constituting a mandatory subject of bargaining. In ap-

16. 219 NLRB 388 (1975).

plying the principles expressed in *Lone Star Steel Company* to the instant proceeding, we note initially that in the former case the Board held, contrary to the finding of the Administrative Law Judge herein, that "certain 'after acquired' clauses, which involve individuals outside the employment relationship, vitally affect the interests of bargaining unit employees and therefore constitute mandatory subjects of bargaining." Beyond this fundamental disagreement with the Administrative Law Judge over the nature of after-acquired clauses, however, we are also of the opinion that he has misperceived the manner in which the two clauses involved in this proceeding are designed to operate.

In the instant case, as in *Lone Star Steel Company,* the application-of-contract clause does not anticipate extending the terms of a collective-bargaining agreement to newly acquired facilities by adding them to the existing bargaining unit, as was the case in *Kroger, supra.*[17] Instead, consistent with the Board's Decision in *Lone Star Steel Company,* we view the two disputed proposals as seeking a contractual commitment by the Charging Party to apply the proposed agreement in its entirety to new mining or coal preparation operations that are concededly outside the scope of the existing unit, provided, of course, that the Union, either through voluntary recognition or Board certification, becomes the bargaining representative of the employees at the new facility. Thus, unlike the Administrative Law Judge, we do not view this clause as purporting to expand the

17. After carefully examining their provisions, we find, for the purposes of this Decision, that both the enabling clause and the application-of-contract clause have the same effect.

existing unit by absorbing the employees at a new operation. For example, if the Charging Party were to commence mining operations on land that is covered by the disputed proposals, those operations may or may not be an accretion to, or an expansion of, the existing unit. The disputed proposals, however, do not address themselves to the solution of that problem. Rather the question of whether the new operation may be properly made a part of the existing bargaining unit would be subject to the Board's ultimate authority to establish an appropriate unit, and any agreement reached between the parties which did not comport with Board policy would be unenforceable where, as here, a Board certification is involved.[18]

In view of the foregoing, we conclude that both the enabling clause and the application-of-contract clause merely seek to preserve the employment opportunities of the employees in the existing unit by ensuring that the employees of any other operation put into production by the Charging Party during the term of the proposed agreement, for whom the Union has obtained bargaining rights, will receive the same wages and benefits as the employees at the Belle Ayr Mine. In this manner, as the Board noted in *Lone Star Steel Company,* both clauses serve to "remov[e] the economic incentive which might otherwise encourage [the Charging Party] to transfer . . . work to other mines under its control." Thus, it is manifest that both of the disputed proposals have a vital effect upon the terms and conditions of employment of the employees at the Belle Ayr Mine and therefore constitute mandatory subjects for bargaining. Accordingly, we find that the Respondents did not vio-

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18. *Kroger, supra* at fn. 6.

late Section 8(b)(3) of the Act by insisting to impasse and striking to obtain the inclusion of the enabling clause and the application-of-contract clause in any collective-bargaining agreement reached herein. We shall therefore dismiss this portion of the complaint.[19]

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19. In finding that the Union did not violate Sec. 8(b)(3) of the Act by bargaining to impasse over the application-of-contract and enabling clauses, Member Penello does not mean to intimate that he no longer adheres to his dissenting opinion in *Houston Division of the Kroger Co., supra.* In *Kroger,* the respondent had separate collective-bargaining agreements with two different unions. Each agreement contained a clause whereby the respondent agreed to recognize the union as the exclusive bargaining representative of employees in designated classifications at all the respondent's stores in its Houston division. When the respondent shifted two stores into the Houston division for administrative reasons, the unions demanded recognition, and, although their claims were based on their respective contracts, both unions offered to submit proof-of-majority status on the basis of authorization cards. The respondent rejected, however, both the claim for recognition under the existing agreement and the offer to prove majority status on the basis of cards.

In dissenting from the Board's finding that the respondent violated Sec. 8(a)(5) of the Act under the above circumstances, Member Penello expressed the view that since the unions possessed a card majority, the respondent could have voluntarily recognized the unions, but that it was not required to recognize them under the terms of the additional store clause. Rather, since the clause did not provide any method for determining union majority, and, in fact, omitted any reference to majority support, the respondent was not precluded from petitioning the Board for an election when confronted with the unions' demand for recognition. See *Linden Lumber Division, Summer & Co.* v *N.L.R.B.,* 419 U.S. 301 (1974).

In the instant case, as the Union's letter of January 9 clearly indicates, both the application-of-contract and

Appendix B.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusions of Law 4, 5, 6, and 7:

"4. United Mine Workers of America, Local No. 1854, has been, at all times material herein, the exclusive representative of the employees in the aforesaid unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment.

"5. By engaging in a strike for the purpose of forcing Amax to enter into a collective-bargaining agreement containing the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

"6. By engaging in a strike and picketing with an object of forcing or requiring Amax to enter into a collective-bargaining agreement containing the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair

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enabling clauses were to become operative only if the Union was either recognized by the Employer or certified by the Board. Thus, the objections that Member Penello had with respect to the clauses in *Kroger* are not present in this case. Accordingly, he joins with his colleagues in finding the two clauses involved herein constitute mandatory subjects of bargaining on which the Union could lawfully bargain to impasse.

and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

"7. By insisting to the point of impasse that Amax accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act."

2. Delete Conclusion of Law 8 and renumber the subsequent paragraphs accordingly.

3. Insert the following immediately after renumbered Conclusion of Law 10:

"11. By striking to compel Amax to bargain through a multiemployer association, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) and 8(b)(4)(i) and (ii)(A) of the Act."

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, United Mine Workers of America, Washington, D.C., and United Mine Workers of America, Local 1854, Gillette, Wyoming, their officers, agents, and representatives, shall take the action set forth in said recommended Order, as so modified.

Appendix B.

1. Insert the following after paragraph 1(c) and reletter the subsequent paragraphs accordingly:

"(d) Engaging in, calling or causing the employees in the appropriate unit described herein above to engage in, a strike in order to compel Amax Coal Company to bargain through a multiemployer association."

2. Substitute the following for renumbered paragraphs 1(f), (g), (h), and (i).

"(f) Refusing to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering the employees in the bargaining unit described hereinabove.

"(g) Refusing to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering employees in the bargaining unit described hereinabove.

"(h) Inducing or encouraging any individuals employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to

perform any services or threatening, coercing, or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where, in either case, an object thereof is to force or require Amax Coal Company, in connection with its Belle Ayr Mine, to enter into any contract or agreement containing the above-described clauses, which are prohibited by Section 8(e) of the Act.

"(i) Restraining or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 29, 1978

JOHN H. FANNING, Chairman

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

BETTY SOUTHARD MURPHY, Member

JOHN C. TRUESDALE, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix B.

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Amax Coal Company by failing to give notice of the existence of any dispute between United Mine Workers of America, Local No. 1854, and United Mine Workers of America, and the Company, involving the bargaining unit described below, to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of any existing contract pursuant to Section 8(d)(4) of the Act. The bargaining unit is:

> All production and maintenance employees employed by the Amax Coal Company, at its Belle Ayr Mine near Gillette, Wyoming; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT engage in, call, or cause the employees in the appropriate unit described above to engage in, a strike for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act.

WE WILL NOT restrain or coerce the Amax Coal Company in the selection of its representatives for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described above.

WE WILL NOT engage in, call, or cause the employees in the aforesaid appropriate unit to engage in, a strike in order to compel Amax Coal Company to bargain through a multiemployer association.

WE WILL NOT refuse to bargain collectively by failing and refusing to meet with Amax Coal Company for the purpose of negotiating a collective-bargaining agreement covering the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering the employees in the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering employees in the aforestated bargaining unit.

WE WILL NOT induce or encourage any individuals employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or

to perform any services or threatening, coercing, or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where, in either case, an object thereof is to force or require Amax Coal Company, in connection with its Belle Ayr Mine, to enter into any contract or agreement containing the above-described clauses which are prohibited by Section 8(e) of the Act.

WE WILL NOT restrain or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act.

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854
(Labor Organization)

Dated By
(Representative) (Title)

UNITED MINE WORKERS OF AMERICA
(Labor Organization)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721 19th Street, Denver, Colorado 80202, Telephone 303-837-3551.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2310

AMAX COAL COMPANY, a Division of AMAX, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, and UNITED MINE WORKERS OF AMERICA, *Intervenors*

No. 78-2489

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, and UNITED MINE WORKERS OF AMERICA, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

AMAX COAL COMPANY, a Division of AMAX, Inc.,
Intervenor

PETITIONS FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD and CROSS-APPLICATION FOR ENFORCEMENT

Argued October 18, 1979
Before GIBBONS,* HIGGINBOTHAM, *Circuit Judges*
and ZIEGLER, *District Judge***

(Filed February 1, 1980)

*Judge Gibbons did not participate in the decision of the Court, although he heaard oral argument.

**Honorable Donald E. Ziegler of the United States District Court for the Western Pennsylvania, sitting by designation.

Appendix C.

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Appendix C.

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Opinion of the Court

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*

This case is before the Court upon the petitions of Amax Coal Company, a division of Amax, Inc., (Amax or the Company) and the United Mine Workers of America (the Union or UMWA) to review an order of the National Labor Relations Board (the Board). The Board found that the Union violated the National Labor Relations Act, 29 U.S.C. §§151 *et seq.,* (the Act) by threatening to strike and by striking to coerce Amax into bargaining through a multi-employer group; by refusing to meet and bargain separately with Amax before February 3, 1975; by striking without first notifying the Federal Mediation and Conciliation Service about its dispute with Amax; by bargaining to impasse and striking in support of its demands that the Company agree to six contract clauses in violation of Section 8(e) of the Act. 29 U.S.C. §158(e). The Board also found that the Union did not violate the Act by bargaining to impasse upon several other clauses that the General Counsel had alleged to be nonmandatory or unlawful, and that neither party had engaged in overall bad faith bargaining. Finally, the Board declined to decide whether the Union had violated the Act by insisting upon several other contract clause proposals because the vio-

lations had not been alleged in the complaint. The Company has intervened in the proceeding initiated by the Union; the Union has intervened in the proceeding initiated by the Company; and the Board has filed a cross-application for enforcement of its order. The cases have been consolidated for the purposes of briefing and argument.

Because we hold that the management trustee of this Union's pension and welfare fund is a collective bargaining representative within the meaning of Section 8(b)(1)(B), we conclude that the Union violated the Act by striking to obtain Amax's participation in the fund whose management trustee is not selected by Amax. We also conclude that the Union bargained to impasse on two clauses that were not mandatory subjects of bargaining. Accordingly, the Company's petition for review will be granted and the Board's cross-application for enforcement of its order will be denied insofar as they relate to the trust fund representatives and to the "enabling" and "coal lands" clauses. The Union's petition for review will be denied.

I. Factual Background

Amax Coal Company, a division of Amax, Inc., is in the business of operating coal mines, primarily bituminous coal mines in the midwestern United States. It bargains with the United Mine Workers of America (the Union or the UMWA) for its midwestern mines as a member of the Bituminous Coal Operators Association (BCOA). In 1972, Amax opened the Belle Ayr Mine in Gillette, Wyoming, its first sub-bituminous surface mine, and agreed to a contract with the Union covering that mine. The contract contained most of the same terms as the national BCOA contract. The BCOA contract, and

the similar contracts signed by the western surface mines, were scheduled to terminate on November 12, 1974.

In 1974, the Union decided to seek contract terms for the western mines that would depart significantly from the BCOA's present contract terms. The Union proposed that a multi-employer bargaining group be formed by the western mining companies. Those companies that agreed to bargain through a multi-employer association were to be granted sixty day extensions of their contracts. Amax's request for this sixty day extension was rejected by the Union. Additionally, the Union made clear that it viewed Amax as a member of the multi-employer bargaining association and warned that "[i]f you don't get into this association, you are going to have problems everywhere. You know how coal miners are." App., at 38a. Amax thereafter filed the initial unfair labor practice charge in this case alleging, *inter alia*, that the Union's refusal to bargain separately with Amax violated the Act.

Amax made two more unsuccessful attempts to initiate bargaining with the Union. On January 11, Amax negotiators hand-delivered a new contract offer to UMWA's General Counsel Joseph Yablonski in a last minute effort to avoid the strike scheduled for the next day. Yablonski refused even to meet with them and, on January 12, the Union struck Amax and the other western mines as scheduled. On January 18, Amax sent the Union a telegram requesting negotiations; this request was ignored. Upon learning that the Board's General Counsel intended to seek an injunction against the Union's conduct, Yablonski agreed to meet separately with Amax and to submit to Amax the new contract pro-

posal that the Union had prepared for its other negotiations.[1]

The parties held eight negotiating sessions between February 3 and February 18. Although they reached tentative agreements on more than forty items included in the Union's proposal and the Union agreed to accommodate Amax on several items, the parties remained far apart on many basic issues. Three more unsuccessful meetings were held between February 26 and March 7.[2]

On March 14, Elkins Payne, Amax's Vice-President, and Daniel Gruender, Amax's attorney, met with Daniel Edelman, the Union's negotiator, and presented him with a complete contract proposal, which Payne stated was Amax's final offer.[3] Payne stated that this was a

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1. The proposal was submitted to Amax and to the multi-employer bargaining group, the Peabody Group, on January 24, and to the Pittsburgh & Midway Coal Company (P & M) about a week earlier. The Union had broken off negotiations with the Peabody Group on January 15 because of lack of progress, but had continued negotiating with P & M.

2. During the February 26 meeting, the Union submitted as its new contract proposal the agreement it had reached with the Peabody Group on February 22. On March 4, the parties met with a federal mediator. The Union suggested that a "memorandum of understanding" be used to clarify the intent of some contractual provisions and to accommodate any peculiar conditions at the Belle Ayr mine. Amax Vice-President Elkins Payne met separately with Union negotiator Daniel Edelman on March 7 to explore further the possibility of using a "memorandum of understanding" to iron out some of their differences.

3. The new proposal modified more than forty sections of Amax's previous proposal to conform to the Peabody contract and changed additional sections to agree substantially with it. The remainder of the new proposal was virtually unchanged and those new items were minor.

package proposal, and that the Union must either accept or reject the entire package. He also emphasized that unless the Union agreed to accept the entire final proposal by the close of the business day on March 17 Amax would consider the proposal rejected and would proceed to implement its terms.

The Union's bargaining council did not begin considering Amax's proposal until the afternoon of March 17 and had not reached a final decision by the end of the day. Amax considered the Union's failure to accept the proposal as a rejection. Within the next week, the Belle Ayr Mine was again in operation under the terms of Amax's final proposal. On April 11, the Union formally rejected Amax's proposal.

The parties had only one negotiating session during the three months following Amax's implementation of its final proposal. Although all of the major issues were discussed during this meeting on May 28, no progress was made.[4] Neither party made any concessions.

Following an unofficial discussion in June with Amax Vice-President Roger Sonnemann, Yablonski submitted a new contract proposal to the Company on July 1, that contained concessions in almost every area of dispute. The new proposal did not, however, compromise

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4. The Union would not compromise its demand for a common expiration date with the Peabody contract or its insistence on the Union's multi-employer pension fund. Amax's position was that the Union should be interested in the level of benefits, and that the administrative arrangements should be left to the Company. Both parties disagreed on the question of reinstating strikers, and Amax continued to object to the clauses in the Peabody contract that it believed to be unlawful.

the Union's position on the termination date, the pension and welfare funds, or the reinstatement of strikers.

On July 17, Yablonski sent a telegram to Amax Board Chairman Ian MacGregor with a copy to Payne, expressing his frustration at having heard nothing from Amax's negotiators since he had submitted the new contract proposal. The telegram further stated that if no agreement was reached by July 22, the date set for an Amax stockholders meeting, the Union intended to file antitrust charges against Amax with the Federal Trade Commission. Payne agreed to meet with Yablonski on July 21.

Little was accomplished at the negotiations on July 21 and 22. Amax continued to reject all but a few relatively minor items in the Union's new proposal. On the afternoon of July 22, the Union filed charges with the FTC; Union representatives also picketed Amax's stockholders meeting and voiced their complaints about the negotiations during the meeting. Although negotiations resumed on August 7 and 8, they again proved unproductive. On August 18 and 19 Yablonski and Payne exchanged telegrams accusing each other of responsibility for the negotiating deadlock.

Negotiations continued sporadically through the fall and winter of 1975. On November 14 the Union made a new contract offer containing more concessions. The parties made no progress toward an agreement, however, and negotiations ended in February, 1976 amid reciprocal accusations of bad faith.

II. Collective Bargaining Representatives

A. Coercion of Amax to Join the Peabody Group

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer

in the selection of his representatives for the purposes of collective bargaining. . . ." 29 U.S.C. §158(b)(1)(B). The Board found that "by attempting to compel [Amex] to relinquish its right to negotiate independently and instead negotiate through a multi-employer association, the Union engaged in a classic example of the type of conduct which Congress sought to proscribe in enacting Section 8(b)(1)(B) of the Act." 238 N.L.R.B. No. 214 at 12-13. (footnote omitted). Substantial evidence supports this conclusion.

On November 2, 1974, Arnold Miller, the Union's President, sent identical letters to each of the twelve western mining companies whose employees were represented by the Union, explaining the Union's new approach to western bargaining and proposing that the mining companies execute "a single successor Sub-bituminous and Lignite Agreement." App., at 353a (iii). The letters also stated, "Contingent upon your assent to our proposal, the UMWA offers to extend the present Agreement with your company for a period of sixty days beyond November 12, 1974." *Id.*

On November 6, Hollie Hopper, Amax's President, responded that Amax would be unable to bargain with the Union until the Board disposed of a representation petition at the Belle Ayr Mine filed by another union. A few days later, Amax Vice President Payne telephoned Miller's assistant, Ed James, to confirm this position. Payne told James that Amax preferred to bargain independently for the Belle Ayr Mine, and asked whether it could receive the sixty day contract extension without joining the multi-employer group. James replied that unless Amax joined the employer association it would not get the two month extension; but he promised to

look into the possibility of extending Amax's contract until after the pending representation election. The Union subsequently notified Amax that it would extend the contract thirty days, to December 12.

On November 23, the day after the UMWA won the representation election at the Belle Ayr Mine, Payne drafted a letter to the Union, for Hopper's signature, to explain the conditions under which Amax would consider joining the multi-employer association, the Peabody group.[5] However, because he felt he could better explain in person, his concerns over the amount of influence Amax would exert within the Peabody Group, Payne arranged for a meeting with Union officials instead of mailing the letter.

On November 25, Payne and Hopper met with James and UMWA's General Counsel, Yablonski. Payne explained that Amax was reluctant to join the Peabody Group because it felt that the Group's voting procedures were unfair to it.[6] At the end of the meeting Payne said that after Amax discusses its problems with the Peabody Group, it would notify the Union whether or not it would join the Peabody Group. Later that day, Payne mailed the letter he had drafted on November 23, without changing the date on the letter. The letter stated that

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5. Four of the western mining companies had agreed to the Union's proposal and formed a multi-employer bargaining group, called "the Peabody Group", after its largest member, the Peabody Coal Company.

6. Voting in the Peabody Group was weighted according to the amount of coal currently produced by each mine. Amax's vote would be based on its current output of about 500,000 tons, even though it would be producing almost 20 million tons before the contract term ended.

Amax was "considering participation" in the Peabody Group, and requested that Miller sign and return a copy of the letter thus indicating his agreement with the following three conditions: another extension of Amax's contract to January 12, 1975; an individually executed contract covering only the Belle Ayr unit; and the retention of Amax's right to bargain independently in the future. App., at 362a-63a. The letter stated further that after Miller's confirmation was received, Amax would contact the Peabody Group in order to "resolve any other problems" relating to Amax joining the Group. After signing the November 23 letter, Miller telegraphed Amax that he had signed the "letter of agreement" and was extending Amax's contract to January 12, 1975.

After receiving Miller's telegram, Payne informed Yablonski that Amax had been unable to come to terms with the Peabody Group and thus intended to bargain separately for the Belle Ayr Mine. The Company and Union representatives then discussed their respective contract objectives, and Amax agreed to provide information requested by the Union. At the conclusion of the meeting, Amax Vice President Sonnemann reiterated Amax's decision to bargain independently. Yablonski acknowledged this statement by nodding his head.

Payne wrote to Yablonski the next day confirming the tentative arrangements made at the meeting concerning the upcoming negotiations for the Belle Ayr Mine. Having received no reply to his letter, Payne phoned Yablonski on December 30 and was informed that Yablonski considered Amax to be a member of the Peabody Group.[7] Payne immediately telegraphed Yab-

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7. Negotiations between the Union and the Peabody Group began on December 20, 1974. The Union

lonski that Amax intended to "bargain with the UMWA for the Belle Ayr Mine operation independently." App., at 368a.

On January 6, 1975, a UMWA delegation headed by International Vice President Michael Trbovich met with Amax's bargaining team. Each party's proposal differed substantially from the others' and each sought significant changes from the terms of the 1971 contract. After discussing the Union proposal, the meeting adjourned.

James Marketti, Director of western organizing for the Union, opened the January 7 meeting by announcing that the Union would not negotiate a separate contract for the Belle Ayr Mine and that they were meeting separately with Amax for informational purposes only and not to negotiate. He stated that Amax would be bound by any contract executed by the Peabody Group. An argument on this question ensued, after which the parties agreed to review Amax's proposals without waiving their positions on bargaining. At the end of the meeting. Marketti stated that the Union would strike Amax when the contract extension expired January 12 unless the Union reached agreement with the Peabody Group, and he warned Payne, "If you don't get into this association, you are going to have problems everywhere. You know how coal miners are." In response to an inquiry whether this was a threat to strike Amax's midwestern mines, Trbovich stated, "You know exactly what we are talking about." App., at 38a, 64a. On January 8, Yablonski confirmed by letter the Union's refusal to bargain separately with Amax stating:

> The UMWA expressly and unequivocally rejects your purported withdrawal from the Peabody

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presented no evidence that the Peabody Group ever claimed to represent Amax.

> Group, and we expect you to be bound by any agreement which we may reach in those negotiations.

App., at 368a(ii).

Despite this, the Union argues that its conduct was lawful because it contends Amax joined the Peabody Group on November 23 and thereafter failed to serve adequate notice of withdrawal prior to the commencement of multi-employer negotiations on December 20, 1974. We disagree.

First, the test of membership in a multi-employer bargaining group is whether the employer has "indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action." *NLRB v. Dover Tavern Owners' Assn,* 412 F.2d 725, 727 (3d Cir. 1969) *quoting Western States Regional Council No. 8 v. NLRB,* 398 F.2d 770, 773 (D.C.Cir. 1968). The Board found that the November 23 letter did not indicate an unequivocal intention to be bound by group action since it predicated Amax's participation in the Peabody Group on two independent conditions: 1) that Miller agree to the three conditions stated in the letter and 2) that the Peabody Group agree to a satisfactory arrangement for allocation of voting rights within the Group. The second condition was not fulfilled. The Board's findings are supported by substantial evidence.

Second, the Board found that even if Amax agreed to be bound by the multi-employer negotiations on November 23, Payne's December 18 letter plainly stated Amax's intention to bargain individually with the Union for a separate contract covering only the Belle Ayr mine. Since Amax clearly disassociated itself from the Peabody Group in timely fashion, the Union's subsequent strike, which was designed to force Amax to join the

Peabody Group, violated Sections 8(b)(1)(B) and 8(b)(4)(A).[8] 29 U.S.C. §§158(b)(1)(B), 158(b)(4)(A).

Finally, substantial evidence supports the Board's conclusion that the Union's refusal to negotiate with Amax from January 7, 1975 to February 3, 1975, while insisting that Amax would be bound by the Peabody negotiations, violated Section 8(b)(3). 29 U.S.C. §158(b)(3).

B. *Trust Fund Representatives*

Amax argues that the Union's conduct in insisting to impasse and striking subsequently to obtain Amax's participation in the Union's pension and welfare trust funds, whose management trustee is not selected by Amax, is coercion in the selection of a representative for the purposes of collective bargaining in violation of Sections 8(b)(1)(B) and 8(b)(3). We are thus asked to decide whether employer trustees of a Section 302(c) Taft-Hartley Trust are collective bargaining representatives within the meaning of Section 8(b)(1)(B). The Board, relying on its decision in *Central Florida Sheet Metal Contractors Assoc., Inc.,* 234 N.L.R.B. No. 162 (1978), held that the trust fund's management trustee is not a collective bargaining representative within the meaning of Section 8(b)(1)(B).

In *Central Florida,* the Board concluded that the trustees of a jointly administered, multi-employer trust

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8. Section 8(b)(4)(A) proscribes strikes and other coercive conduct by Unions where "an object thereof is: (A) forcing or requiring any employer . . . to join any . . . employer organization . . . ." 29 U.S.C. §158(b)(4)(A).

fund are solely fiduciaries, owing undivided loyalty to the beneficiaries of such a plan, and are not, therefore, collective bargaining representatives. The Board expressly referred to and rejected this Court's decision in *Associated Contractors of Essex County, Inc. v. Laborers Int. Union,* 559 F.2d 222 (3d Cir. 1977). 234 NLRB at 1247 n.31.

In *Associated Contractors,* this Court considered whether the Taft-Hartley Act's objective of equal representation by employer and employee trustees on the board of welfare and pension funds "is thwarted when the employer trustees represent two rival associations." 559 F.2d at 223. We held that the equal representation clause was violated when trustees, representing a rival association not a party to the original trust agreement, were added to the board without the consent of the original employer association. The amendments in that case were found to create the potential for abuse and combination of alliances placing the union in a dominant position—four were union trustees, two were original employer trustees, and two were employer rival trustees.

This Court, through Judge Rosenn, reviewed the law of equal representation. Relying on *Arroyo v. United States,* 359 U.S. 419, 425-26 (1959), we noted that Section 302 was enacted to prevent "the possible abuse by union officials of the power which they might achieve if welfare funds were left to their sole control." 559 F.2d at 226. Thus, the requirement of equal employer-employee representation in the joint administration of trust funds was central to the congressional scheme set forth in Section 302. The Court stated:

> The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit

> trust fund is quasi-adversarial in nature. Naturally, the trustees of such a trust fund function are fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. *See Lamb v. Carey,* 162 U.S. App. D.C. 247, 498 F.2d 789, 793 (1974); *Toensing v. Brown,* 374 F.Supp. 191 (N.D.Cal. 1974), *aff'd,* 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Labor Law of Welfare and Pension Plans,* 55 Cornell L.Rev. 901, 921 et seq. (1970). The trustees' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section 302(c)(5). Congress envisioned the conflict of views of employer and employee as a distilling process which would provide safeguards against trust fund corruption.

559 F.2d at 227-28.

The logic and holding of this court's opinion in *Associated Contractors* are equally applicable to the facts of this case. Accordingly, we hold that the Union's conduct in insisting to impasse and striking to obtain Amax's participation in the Union's pension and trust fund violates Sections 8(b)(1)(B) and 8(b)(3).

C. *Joint Training Committee*

The Board concluded that the Union did not violate Section 8(b)(1)(B) or 8(b)(3) by insisting to impasse

for the establishment of a committee to develop adequate safety training programs for employees. Amax argues that because the Joint Training Committee would have members appointed by other western mining companies, the Union's demand for the committee was an attempt to coerce Amax in the choice of its collective bargaining representatives. Because the Committee's function is merely advisory, they are not collective bargaining representatives within Section 8(b)(1)(B).

Article XV of the Union's January 27 contract proposal provided for the establishment of a Joint Western Surface Mining Industry Training Committee composed of three union representatives and three employer representatives "appointed by the Employers." It further provided that each side would also assign a full time "trained representative" to assist "the Committee and the employers signatory hereto in developing and implementing the various training programs provided for herein." The Article also set forth the types of training programs required with minimum standards for each, specifically providing that each program "shall be developed by the Employer [Amax]." App., at 105a.

The Board reasonably concluded that since the contract clause specifically reserved to the particular employer involved the right to develop the actual training program to be implemented at its mine the function of the Joint Committee must be merely advisory. Although the training programs referred to in Article XV, Sections (b) - (f) of the Union proposals are to have certain minimum standards, they are all programs in which Amax was in control, with power to put the programs into effect or not. The training representatives have no power to do more than advise and recommend.

Amax also raises the same issues with regard to the Mine Health and Safety Committee. Article III(c) states, "[T]he Union and Employer shall jointly establish and fund a course of health and safety training for members of the Mine Health and Safety Committee . . . The training program shall be established by the Joint Western Surface Mining Industry Training Committee." App., at 106a. The Board concluded that Article III(c)(2), even if not properly before it, should be interpreted consistently with Article XV and thus there is no question that the committee members are not collective bargaining agents. Moreover, the Safety Committee is composed of employees chosen by the Union and Section 8(b)(1)(B) prevents the Union from interfering in the selection of the employer's bargaining representative—not the union's. Accordingly, we will not disturb the Board's order on this issue.

D. *The District Agreements*

Article I of the Union's contract proposal would have carried forward any District Agreements to which Amax was a party.[9] Amax argues that this clause violates Section 8(b)(1)(B) because it requires Amax to accept as its bargaining representative persons representing associations of other employers in other units who negotiated or would negotiate changes in the District Agreements. The Board concluded that the Union had not insisted on this clause to impasse and therefore there was no violation. Substantial evidence supports this finding.

On January 6, Amax negotiators objected to this pro-

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9. District Agreements are local agreements between a district of the Union and a local group of employers.

posal believing it would bind Amax to agreements negotiated by other employers in the area, the contents of which Amax had no knowledge. On February 26, however, Union negotiator Edelman produced copies of the District Agreements for the Amax negotiators and assured them that since Amax was not a party to any of them, the proposed contract clause would have no effect upon Amax. During his March 7 meeting with Payne, Edelman offered to reduce this assurance to writing in the form of a memorandum of understanding that would be included as an addendum to the contract. Although the Union left the proposed clause on the table until November 14, there was almost no further discussion of it and neither party thereafter indicated that it was a significant problem.

III. NONMANDATORY CONTRACT PROPOSALS

A. *Coal Lands and Enabling Clauses*

Amax argues that the Union bargained to impasse on two clauses that were not mandatory subjects of bargaining and thus violated Sections 8(a)(5) and 8(b)(3). The Enabling Clause would require Amax, during the term of the Belle Ayr contract, to agree to the same contract terms for any of its other sub-bituminous mines whose employees selected the UMWA to bargain for them.[10] The Coal Lands clause made it clear that

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10. The Enabling Clause provided:

> This agreement . . . covers the sub-bituminous coal or lignite mines owned or operated by [Amax].

In the November proposal, the coal lands clause was deleted entirely and the Enabling Clause was changed to read:

Amax would have to do this for other facilities whether they were already in operation at the time the Belle Ayr contract was signed or were acquired and put into production during the term of the Belle Ayr contract.[11] The Administrative Law Judge (ALJ) held the two clauses were nonmandatory subjects of bargaining. Relying on its decision in *UMWA and Lone Star Steel Co. and Surface Inductries, Inc.*, 231 N.L.R.B. No. 88 (1977), the Board disagreed and held the clauses to be mandatory subjects and held that the Union's insistence to impasse on them was not in violation of 8(b)(3). It stated:

> In view of the foregoing, we conclude that both the enabling clause and the application-of-contract clause merely seek to preserve the employment opportunities of the employees in the existing unit by ensuring that the employees of any other operation put into production by the Charging Party during the term of the proposed agreement, for whom the Union has obtained bargaining rights, will receive the same wages and benefits as the employees at the

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This agreement covers [Amax's] Belle Ayr Mine and all other western sub-bituminous and lignite mines, coal lands, coal producing and coal preparation facilities, owned or operated or held under lease by it, or by any subsidiary or affiliate at the date of this Agreement, or which may hereafter (during the term of this agreement) be put into production or use on the leases attached hereto as Addendum A.

11. The Coal Lands Clause provided:

(f) . . . this agreement covers the operator of all coal lands, coal producing and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production or use.

> Belle Ayr Mine. In this manner, as the Board noted in *Lone Star Steel Company,* both clauses serve to "remov[e] the economic incentive which might otherwise encourage [the Charging Party] to transfer . . . work to other mines under its control." Thus, it is manifest that both of the disputed proposals have a vital effect upon the terms and conditions of employment of the employees at the Belle Ayr Mine and therefore constitute mandatory subjects for bargaining.

App., at 49a (iii) - (iv).

We cannot agree. Whether these clauses are mandatory subjects of bargaining depends on whether they come within the area of "wages, hours and other terms and conditions of employment." *See NLRB v. Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, 349 (1958). Unlike wages and conditions of employment, the scope of the certified bargaining unit is not a mandatory subject and insistence to the point of impasse on restriction or expansion of the bargaining unit is an unfair labor practice. *Hess Oil & Chemical Corp. v. NLRB,* 415 F.2d 440 (5th Cir. 1969), *cert. denied,* 397 U.S. 916 (1970). The clauses at issue here would require Amax to conduct negotiations on a basis broader than the certified unit. They would require Amax to bargain about wages and other conditions of employment of employees in other units. While the Union has a valid concern in protecting the employees against a shift of production to another mine in order to evade the Union's standards and wages at Belle Ayr, the clause here refers to all new operations and is much broader than necessary to accomplish this goal. Indeed the clause requires that the agreement be put into effect *in toto* elsewhere, including the non-economic provisions that have no bearing on unit employees.

We have reviewed the record and also conclude that there are sufficient facts to support the finding that the clauses were bargained to impasse. Although there is a fine line between work preservation and bargaining unit expansion, the ALJ was correct in finding a violation of Section 8(b)(3) and thus the Board's order on this issue will not be enforced.

B. *The Exemptions Clause; the 1950 Pension Trust; the Exclusion of Local 1854*

Amax argues that the Union violated Section 8(b)(3) by insisting to impasse that Amax accept its proposed exemptions clause, that Amax contribute to the Union's 1950 Pension Fund, and that Local 1854 not be a signatory party to the contract. These issues are plainly not before this Court, however, because the Board declined to decide either whether the parties reached impasse on these issues, or whether there would be a violation even if they did reach impasse on them. The only question before the Court with respect to these proposals is whether the Board abused its discretion in declining to decide these issues because the General Counsel did not include them in the complaint. In the circumstances of this case the Board's refusal to decide these issues was well within its broad discretion to control the fairness of its own proceedings.

The facts are as follows. The complaint in this case alleged violations of Section 8(b)(3) for insisting to impasse on nonmandatory proposals, and then specifically stated each proposed clause that was alleged to have been insisted to impasse; the three clauses at issue here were not mentioned.

Paragraph 17(k) of the complaint alleged bad-faith bargaining. During the first two days of the hearings the

Union objected to evidence that was being offered to show certain contract proposals as nonmandatory, but had not been so alleged in the complaint. Because of the quantity and complexity of the issues involved, the ALJ made it very clear that the Charging Party, Amax, and the General Counsel would be strictly limited to the allegations in the complaint. Thereafter, the General Counsel's motion to amend the complaint specifically to include additional illegal and nonmandatory contract proposals was granted. These three disputed clauses were not in this amendment. The General Counsel was also permitted to amend paragraph 17(k) to allege overall bad-faith bargaining. However, paragraph 17(k) was not amended for the purpose of being a catchall for allegations not specifically named in the complaint as nonmandatory subjects. Thus paragraph 17(k) of the Board's complaint reads:

> Respondent has refused to bargain in good faith with the employer, has engaged in surface bargaining, has negotiated with the employer in bad faith, has exhibited a predetermined resolve not to agree to any proposal but their own, and has insisted upon including nonmandatory and unlawful clauses in any collective bargaining agreement.

Although evidence was received on the Union's bargaining position about these proposals, these issues were not fully litigated. Thus, under the circumstances, it was not unreasonable for the ALJ to conclude that the Union had not received adequate notice and to decide these issues would deny the Union a fair trial. *See Boyle's Famous Corned Beef Co. v. NLRB,* 400 F.2d 154, 163 (8th Cir. 1968) ("General Counsel's position . . . would not be consonant with administrative due process or

fundamental fairness [because] . . . [where] specific acts violative of the section are enumerated, the proof and subsequent findings should be limited to those matters, absent amendment.")

IV. CONTRACT PROPOSALS VIOLATIVE OF SECTION *8(e)*

Section 8(b)(4)(A) makes it an unfair labor practice for a union to engage in a strike or other coercive conduct where "an object thereof is . . . forcing or requiring any employer to enter into any agreement" which is prohibited by Section 8(e). A union violates its bargaining duty under Section 8(b)(3) if it insists to impasse that an employer agree to a clause which violates Section 8(e). *See NLRB v. Wooster Division of Borg-Warner,* 356 U.S. 342, 349 (1958). The Board found that the union bargained to impasse and struck in support of six proposed clauses which the Board found to violate Section 8(e).

Section 8(e) makes it "an unfair labor practice for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or refrains or agrees . . . to cease doing business with any other person." In determining whether the particular clauses here violate Sections 8(e) and 8(b)(4), we must inquire into "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [Amax's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere." *National Woodwork Mfrs. Assoc. v. NLRB,* 386 U.S. 612, 644 (1967).

A. *Successorship Clause*

The Union proposed a clause that would require Amax to condition any sale or conveyance of its opera-

tions upon the successor's assumption of Amax's obligations under the agreement. This "successorship clause" provided:

> [T]his Agreement shall be binding upon all signatories hereto and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this agreement. Provided that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

The Board concluded that this proposal was lawful, both because the transfer of a portion of Amax mining operations to a successor does not constitute "doing business" within the meaning of Section 8(e), and because the effect of the clause was primary.

The phrase "doing business" refers to a continuing business relationship which is capable of being discontinued by one employer in order to force another employer to accede to union demands. *National Woodwork Mfrs. Assoc. v. NLRB,* 386 U.S. at 619-633. Thus, as noted earlier, Section 8(e) was designed to protect neutral employers and their employees, not involved in a labor dispute, from being pressured to assist a union in a dispute with another employer.

Here, it is clear that the sale by Amax of all or part of its business operations would involve no continuing

relationship with the purchaser. There is therefore no possibility of involving Amax in a labor dispute between the purchaser and its employees.

Amax argues, however, that the trading of dormant coal land is a common practice in the coal industry and that the successorship clause would affect adversely Amax's freedom to carry on this allegedly necessary activity. The ALJ found otherwise:

> Amax . . . operates several mines in the midwest, not covered by the contract negotiations involved in this case, but operates only one western mine, the Belle Ayr Mine. However, Amax owns or leases substantially more parcels of coal land than those which make up the Belle Ayr Mine and its midwestern mines. Amax continually purchases coal lands but "seldom sells" coal lands, rather it continually trades coal lands which it owns or leases for coal lands owned or leased by other coal producers. The reason for this is that, since many of the parcels or coal leases acquired by Amax are small and noncontiguous, it is essential for Amax to trade these parcels for others in order to put together a large enough contiguous block of land to support a "viable mining plan," one which will enable Amax to use its land to produce coal. In this regard, the record establishes that Amax does not use its coal lands to produce or process coal unless the area is large enough to support 15 or 20 years of mining operations. *It is a fair inference, from the aforesaid circumstances, that Amax's trading of its coal lands involves noncontiguous parcels not used by Amax to produce or process coal since they do not constitute a "viable mining plan." It is also a fair inference*

> ***that coal lands which constitute a viable mining plan such as the parcels which comprise the Belle Ayr Mine and other facilities which are being used to produce or process coal are seldom if ever traded by Amax.***

App., at 122a. (emphasis added).

After reviewing the record, we conclude that the ALJ's findings regarding the frequency and nature of lands traded by Amax are supported by substantial evidence.[12]

Moreover, even if the conveyance of a portion of Amax's coal mining operations, which is restricted by this clause, constituted "doing business" within the meaning of Section 8(e), the successorship clause is nonetheless lawful because its effect is primary. The clause was clearly designed to assure that Amax's own employees would retain their current contractual benefits in the event that their place of employment is sold to a new employer. The only obligation which the clause would place on Amax is to secure the purchaser's agreement to adopt the contract *before* Amax sells the mining operation to the purchasers—that is, while the employ-

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12. The Company's attempt to stretch the Enabling and Coal Lands clauses to apply the Successorship clause to Amax's dormant coal lands must fail. Under the Enabling and Coal Lands clauses, the contract would only become effective with respect to those coal lands which Amax put "into production" during the term of the contract, and then only after the UMWA became the recognized bargaining representative at the new facility, a development which obviously cannot occur until Amax has employees working there. And as Amax concedes, until its trading of coal lands has successfully resulted in a "viable mining plan," it has "no reason to hire miners to dig coal." Brief at 35.

ees are still Amax's employees. Once the mining operation is actually transferred, the clause would permit the Union to seek compliance only from the new employer, who would have stepped into Amax's shoes and thus become the primary employer of Amax's former employees covered by the contract. In short, since this clause serves to benefit only Amax's own employees, and does not seek to enlist Amax's aid in affecting the labor relations of anyone who is not the employer of those same employees, the effect of the clause is primary.[13]

B. *"Leasing-Licensing Out" Clause*

The Union next challenges the Board's ruling that the proposed "leasing-licensing out" clause violated Section 8(e) because a transfer under the clause constituted "doing business" within the meaning of Section 8(e). Additionally, the Union argues, that even if such a transfer comes within Section 8(e), it is lawful because, by the very nature of the coal mining business, it is a primary work perservation clause.

The Board's conclusion is correct. The two restrictions on licensing out coal operations effectively control the labor relations of the licensee employer and benefit

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13. Because the complaint in this case did not specifically allege that the Successorship clause was a nonmandatory bargaining subject apart from its legality under Section 8(e), the ALJ made no finding with respect to that question. The Company's exceptions to the Board relating to the ALJ's findings with respect to the Successorship clause do not question this issue, and because it filed no motion for reconsideration with the Board challenging the Board's subsequent failure to deal with it, Section 10(e), 29 U.S.C. § 160(e), of the Act precludes the Company from raising the issue in this Court.

union members generally rather than Amax's own employees. The union members required to perform do not have to come from Amax. Thus the clause forces the licensee employer to abide by the union recognition portion of the contract. It serves only the union's organizing interests and does not protect the Amax employees' work standards.

On the "doing business" issue of Section 8(e), it is clear that the clause requires a continuing relationship between Amax and the licensee employer that would permit the Union to force Amax to pressure the licensee employer to comply with Union's future demands. Since the clause forbids Amax from licensing out coal mining operations absent compliance with the contract terms for the licensee's employees, Amax would be obliged to discontinue the licensing agreement if the licensee ever stopped recognizing the Union or abiding by the other terms of the Union's contract with Amax.

C. *Coal Transportation Clause*

The coal transportation clause provided that Amax could subcontract the transportation of its coal "only to a contractor employing members of the UMWA under their agreement." The Board adopted the ruling of the ALJ that the Union violated Sections 8(b)(4) and 8(b)(3) by insisting to impasse and striking to obtain Amax's agreement to its coal transportation clause. We agree.

The clause requires that the subcontractor shall not only agree to provide its employees with the economic benefits of the contract, but to adhere to the noneconomic terms as well. It also provides that Amax may contract out only to contractors who employ Union

members. To that extent, the clause seeks to aid UMWA members generally rather than those union members employed at the Belle Ayr Mine. The continuance of the relationship between the signatory employer and any contractor depends on the contractor's decision to employ UMWA as his employees' bargaining representative and not on the contractor's maintenance of union wage scales or conditions. Its effect is therefore secondary and unlawful.[14] *See A. Duie Pyle, Inc. v. NLRB,* 383 F.2d 772, 777-78 (3d Cir. 1967), *cert. denied,* 390 U.S. 905 (1968).

D. *Repair and Maintenance Work*

The ALJ found and the Board agreed that the Union's Repair and Maintenance Work Clause proposal violated Section 8(e). The proposal prohibited contracting out repair and maintenance work customarily performed by classified employees at the mine or central shop unless the work was performed under a manufacturer's warranty or the employer did not have available equipment or regular employees with necessary skills available to perform the work at the mine or central shop, "provided, however, that the work, shall be performed by UMWA members to the extent and in the manner permitted by law." App., at 134a. The Board's decision will be enforced, for as this Court stated in *A. Duie Pyle, Inc. v. NLRB,* 383 F.2d at 777-78:

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14. The Union argues that the unlawful portion of the clause is severable from the balance of the clause and therefore only that phrase should be stricken. However, since there are no executed contract terms here, there is no illegal agreement to render void and no need to determine whether or not a portion of any contract clause can be lawfully preserved.

The present provisions, to the extent that they require the subcontractees to become employees and members of the union, therefore must also be declared invalid. As in the case of secondary boycotts generally, a union may not employ a collective bargaining agreement with one employer as a means of effectuating its object to coerce another employer to unionize. Nor may it by this means seek to coerce self-employed persons to become union members. Congress had made this clear by §8(b)(4)(A) which prohibits secondary boycotts with an object of "forcing or requiring any employer or self-employed person to join any labor * * * organization * * *."

E. *Construction Clause*

The union proposed a clause that would permit "construction of mine or mine related facility" to be "performed by such outside contractors as are designated by the Employer." It provided, however, that when such work was contracted out, it would be "under the jurisdiction of the UMWA" unless "UMWA contractors qualified to do the work are not available." Additionally, the Union's proposal specified that if a dispute arose over Amax's use of a non-UMWA contractor, Amax would have the burden of proving "that the UMWA contractors qualified to do the work are not available."

For the reasons given in connection with the "coal transportation" and "leasing-licensing out" clauses, the ALJ concluded that this clause was a "union signatory" agreement which violated Section 8(e). We agree. This clause prohibits Amax from subcontracting to a non-UMWA subcontractor even if he maintains working

conditions equivalent to Amax's. It only serves the union's own interest in making sure the subcontractor recognizes the Union, and does not provide any benefit to Amax's employees.

F. *Work Jurisdiction Clause*

The Union's work jurisdiction clause specified that "contracting, subcontracting, leasing and subleasing and construction work" would be "conducted in accordance with" the requirements of other clauses. The Board found that to the extent that this clause would require Amax to comply with the other clauses found to be illegal, the work jurisdiction clause was equally unlawful. We agree. Since the work jurisdiction clause incorporates the other illegal clauses, it likewise violates Section 8(e).

V. Failure to Notify the Federal Mediation and Conciliation Service

Section 8(d)(1) prohibits a party to a collective bargaining agreement from modifying or terminating the agreement without serving written notice on the other party sixty days prior to the expiration date. Sections 8(d)(3) and (4) require a party to a collective bargaining agreement to notify the Federal Mediation and Conciliation Service (FMCS) within thirty days after such notice of the existence of a dispute and to refrain from striking within the sixty days after such notice has been given. Although Section 8(d)(1) specifically mentions written notice and Section 8(d)(3) does not, the FMCS regulations do require written notice. 29 C.F.R. §1402.1.

The Board found that the UMWA failed to give oral or written notice to the FMCS as required by Section 8(d)(3) and therefore violated Section 8(b)(3) of the Act by striking without complying with Section 8(d). The UMWA argues that there was implicit written notice, that even if no written notice was given, none is required under the statute, that oral notice was given, and that even if no oral notice was given, actual knowledge of the dispute is sufficient. Substantial evidence supports the findings that there was no written or oral notice.

On September 11, 1974 and October 17, 1974, the Union notified the Federal Mediation and Conciliation Service by letter that it was terminating the 1971 National Bituminous Coal Wage Agreement and that it intended to bargain with the employers who were parties to those agreements, either as members of the relevant employers' association or as independent signatories. Attachments to the letter of September 11, 1974 specifically referred to the Union's negotiations with the BCOA—the employers association that negotiated the National Bituminous Coal Wage Agreement—and with the Association of Bituminous Contractors and included sample form letters addressed to "All Independent Signatories" of the 1971 Agreement and the 1972 Coal Mine Construction Agreement. Nothing was said, however, concerning the existence of a contractual dispute between the Union and Amax over the Belle Ayr Mine. The Union concedes that its letter and attachments never specifically mention the dispute with Amax over the Belle Ayr Mine. Brief of UMWA at 69. It argues, however, that Section 8(d)(3) does not require written notice. Nonetheless, even if this were a correct interpretation of Section 8(d)(3), there is virtually no evidence

to support the Union's allegation of oral notification. The evidence referred to only indicates an informal chat between an FMCS mediator and Yablonski without specific mention of Belle Ayr. As a result, the Board was correct to conclude that it was unnecessary to decide whether written notice was required because no oral notice had been given.

Finally, the Union argues that even if it failed to give the FMCS any notice of the Belle Ayr dispute, Section 8(d)(3) is satisfied if the FMCS independently obtained "actual knowledge" of the dispute from other sources. We disagree. Nothing in the statute or in the relevant case law relieves the Union of its statutory duty to notify the FMCS. The purpose of Section 8(d)(3) is "to increase the likelihood that the mediation services will have sufficient time to intervene. The method Congress chose to serve this purpose was to assign to one party, the initiating party, a fixed and definite responsibility for notifying the mediation services." *Hooker Chemicals & Plastics Corp. v. NLRB,* 573 F.2d 965, 970 (7th Cir. 1978). This purpose is not fulfilled when the FMCS happens to find out about a dispute on its own.

VI. Overall Failure to Bargain in Good Faith

Amax charged the Union with a failure to bargain in good faith and the Union raised the same claim against Amax as an affirmative defense. The Board held that neither party had engaged in bad faith bargaining. Except for that conduct which we found to constitute violations of the Act, we conclude that as to the remaining issues the Board's finding that neither party engaged in bad faith bargaining is supported by substantial evidence.

Appendix C.

VII.

For the foregoing reasons the company's petition for review will be granted and enforcement of the Board's order will be denied insofar as it relates to the trust fund representatives and to the "enabling" and "coal lands" clauses. The Union's petition for review will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

AMAX COAL COMPANY, a Division of AMAX, INC.,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent
UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, and UNITED MINE WORKERS OF AMERICA,
Intervenors
} No. 78-2310

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, and UNITED MINE WORKERS OF AMERICA,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent
AMAX COAL COMPANY, a Division of AMAX, INC.,
Intervenor.
} No. 78-2489

Judgment

Before: GIBBONS,* HIGGINBOTHAM, Circuit Judges and ZIEGLER, District Judge**

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*Judge Gibbons did not participate in the decision of the Court, although he heard oral argument.

**Honorable Donald E. Ziegler of the United States District Court for the Western Pennsylvania, sitting by designation.

Appendix D.

THIS CAUSE came on to be heard upon petitions filed by United Mine Workers of America, and United Mine Workers of America, Local 1854, and Amax Coal Company, to review an order of the National Labor Relations Board issued against United Mine Workers of America, Local No. 1854, and United Mine Workers of America, their officers, agents, and representatives on September 29, 1978, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on October 18, 1979, and has considered the briefs and transcript of record filed in this cause. On February 1, 1980, the Court being fully advised in the premises, handed down its decision granting the company's petition for review; denying enforcement of the Board's order as it relates to the trust fund representatives and to the "enabling" and "coal lands" clauses and denying the Union's petition for review. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

Petitioners, United Mine Workers of America and United Mine Workers of America, Local 1854, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amax Coal Company by failing to give notice of the existence of any dispute between it and the Company, involving the bargaining unit described hereinabove, to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of any existing contract pursuant to Section 8(d)(4) of the National Labor Relations Act (hereinafter called the Act).

(b) Engaging in, calling or causing the employees in the appropriate unit described hereinabove to engage in a strike for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act.

(c) Restraining or coercing the Amax Coal Company in the selection of its representatives for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described herein.

(d) Engaging in, calling or causing the employees in the appropriate unit described herein to engage in, a strike in order to compel Amax Coal Company to bargain through a multiemployer association.

(e) Refusing to bargain collectively by failing and refusing to meet with Amax Coal Company for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described hereinabove.

(f) Refusing to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering the employees in the bargaining unit described hereinabove.

(g) Refusing to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontract-

ing of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering employees in the bargaining unit described hereinabove.

(h) Refusing to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: enabling an application of contract to coal lands, which are nonmandatory subjects of bargaining.

(i) Inducing or encouraging any individuals employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where, in either case, an object thereof is to force or require Amax Coal Company, in connection with its Belle Ayr Mine, to enter into any contract or agreement containing the above-described clauses, which are prohibited by Section 8(e) of the Act.

(j) Restraining or coercing Amax Coal Company in the selection of its collective bargaining representative by insisting to the point of impasse that Amax Coal Company participate in the UMWA's multiemployer pension and welfare funds.

(k) Restraining or coercing employees in the exercise of their rights guaranteed Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls copies of the attached notice marked "Appendix." Copies of said notice, on forms to be provided by the Regional Director for Region 27, (Denver, Colorado) of the National Labor Relations Board shall, after being duly signed by representatives of Petitioners, be posted by Petitioners immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Petitioners to insure that said notices are not altered, defaced or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for forwarding to Amax Coal Company for information and, if it is willing, for posting by it in all locations where notices to its employees in the unit described hereinabove are customarily posted.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this judgment what steps Petitioners have taken to comply herewith.

IT IS FURTHER ORDERED that each party shall bear its own costs.

BY THE COURT
A. LEON HIGGINBOTHAM
Circuit Judge

DATE: April 3, 1980

Appendix D.

APPENDIX

NOTICE TO MEMBERS

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Amax Coal Company by failing to give notice of the existence of any dispute between United Mine Workers of America, Local No. 1854, and United Mine Workers of America, and the Company, involving the bargaining unit described below, to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the Act, and by failing to continue in full force and effect without resorting to strike all the terms and conditions of any existing contract pursuant to Section 8(d)(4) of the Act. The bargaining unit is:

> All production and maintenance employees employed by the Amax Coal Company, at its Belle Ayr Mine near Gillette, Wyoming; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT engage in, call, or cause the employees in the appropriate unit described above to engage in, a strike for the purpose of modifying or terminating a collective-bargaining agreement, without first having complied with the requirements of Section 8(d) of the Act.

WE WILL NOT restrain or coerce the Amax Coal Company in the selection of its representatives for the purpose of negotiating a collective-bargaining agreement covering the bargaining unit described above.

WE WILL NOT engage in, call, or cause the employees in the aforesaid appropriate unit to engage in, a strike in order to compel Amax Coal Company to bargain through a multiemployer association.

WE WILL NOT refuse to bargain collectively by failing and refusing to meet with Amax Coal Company for the purpose of negotiating a collective-bargaining agreement covering the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering the employees in the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively with Amax Coal Company by striking for the purpose of forcing inclusion of the following clauses: leasing, subleasing, and licensing out of coal lands; contracting and subcontracting of the transportation of coal; contracting and subcontracting of repair and maintenance work; construction work; and work jurisdiction, all of which are prohibited by Section 8(e) of the Act, in any collective-bargaining agreement covering employees in the aforestated bargaining unit.

WE WILL NOT refuse to bargain collectively by insisting to the point of impasse that Amax Coal Company accept the following clauses: enabling an application of contract to coal lands, which are nonmandatory subjects of bargaining.

Appendix D.

WE WILL NOT induce or encourage any individuals employed by Amax Coal Company to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining Amax Coal Company by picketing or causing a work stoppage, or otherwise, where, in either case, an object thereof is to force or require Amax Coal Company, in connection with its Belle Ayr Mine, to enter into any contract or agreement containing the above-described clauses which are prohibited by Section 8(e) of the Act.

WE WILL NOT restrain or coerce Amax Coal Company in the selection of its collective bargaining representative by insisting to the point of impasse that Amax Coal Company participate in the UMWA's multi-employer pension and welfare funds.

WE WILL NOT restrain or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act.

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

Appendix D.

UNITED MINE WORKERS OF AMERICA
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Custom House, Room 260, 721 19th Street, Denver, Colorado 80202, Telephone 303-837-3551.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2310 and 78-2489

AMAX COAL COMPANY, etc., Petitioner v. NATIONAL LABOR RELATIONS BOARD, Respondent; United Mine Workers of America, Local No. 1854, and United Mine Workers of America, Intervenors

No. 78-2310

UNITED MINE WORKERS OF AMERICA, LOCAL 1854 and UNITED MINE WORKERS OF AMERICA, Petitioners v. NATIONAL LABOR RELATIONS BOARD, Respondents; Amax Coal Company, etc., Intervenor

No. 78-2489

Sur Petition for Rehearing

Present: HIGGINBOTHAM, *Circuit Judge* and ZIEGLER, *District Judge**

The petition for rehearing filed by Amax Coal Company in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,
A. LEON HIGGINBOTHAM
Circuit Judge

Dated: May 29, 1980

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*The Hon. Donald E. Ziegler of the U. S. District Court for the Western District of Pennsylvania, sitting by designation.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2310 and 78-2489

Amax Coal Company, etc., Petitioner v. National Labor Relations Board, Respondent; United Mine Workers of America , Local No. 1854, and United Mine Workers of America, Intervenors

No. 78-2310

United Mine Workers of America, Local No. 1854 and United Mine Workers of America, Petitioners v. National Labor Relations Board, Respondents; Amax Coal Company, etc., Intervenor

No. 78-2489

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges,* and ZIEGLER, *District Judge.**

The petition for rehearing filed by United Mine Workers of American and United Mine Workers of America, Local No. 1854 in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and

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*Hon. Donald E. Ziegler of the U. S. District Court for the Western District of Pennsylvania, sitting by designation.

Judges Gibbons and Sloviter did not participate in the disposition of this Petition for Rehearing.

no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
A. LEON HIGGINBOTHAM
Circuit Judge

Dated: May 29, 1980

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2310 and 78-2489

Amax Coal Company, etc., Petitioner v. National Labor Relations Board, Respondent; United Mine Workers of America , Local No. 1854, and United Mine Workers of America, Intervenors

No. 78-2310

United Mine Workers of America, Local No. 1854 and United Mine Workers of America, Petitioners v. National Labor Relations Board, Respondents; Amax Coal Company, etc., Intervenor

No. 78-2489

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges,* and ZIEGLER, *District Judge.**

The petition for rehearing filed by National Labor Relations Board in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

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*Hon. Donald E. Ziegler of the U. S. District Court for the Western District of Pennsylvania, sitting by designation.

Judges Gibbons and Sloviter did not participate in the disposition of this Petition for Rehearing.

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
A. LEON HIGGINBOTHAM
Circuit Judge

Dated: May 29, 1980

APPENDIX H

Subchapter IV of the Labor-Management Relations Act of 1947, Title III, §302, 61 Stat. 157, 29 U.S.C. §186 (Amendments of Oct. 27, 1978 are not relevant and are not reproduced herein.)

SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT—Cont'd

§186. RESTRICTIONS ON FINANCIAL TRANSACTIONS

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the

right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of

value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on

retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying

costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

APPENDIX I

Part 4 of the Employees' Retirement Income Security Act, Pub.L. 93-406, Title I, §§401-414, Act of September 2, 1974, 88 Stat. 889, 29 U.S.C. §§1101-1114.

PART 4—FIDUCIARY RESPONSIBILITY

§ 1101. COVERAGE

(a) This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than—

(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

(2) any agreement described in section 736 of Title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

(b) For purposes of this part:

(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of

such policy, be deemed to include any assets of such insurer. For purposes of this pargaraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

Pub.L. 93-406, Title I, § 401, Sept. 2, 1974, 88 Stat. 874.

§ 1102. ESTABLISHMENT OF PLAN

Named fiduciaries

(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Requisite features of plan

(b) Every employee benefit shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objective of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

Optional features of plan

(c) Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

Pub.L. 93-406, Title I, § 402, Sept. 2, 1974, 88 Stat. 875.

§ 1103. ESTABLISHMENT OF TRUST

Benefit plan assets to be held in trust; authority of trustees

(a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this subchapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

Exceptions

(b) The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(i) some or all of the participants of which are employees described in section 401(c)(1) of Title 26; or

(ii) which consists of one or more individual retirement accounts described in section 408 of Title 26, to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of Title 26, whichever is applicable;

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this Act—

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of Title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of Title 26.

Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(c)(1) Except as provided in paragraph (2) or (3) or subsection (d) of this section, or under section

1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution.

(B) If a contribution is conditioned on qualification of the plan under section 401, 403(a), or 405(a) of Title 26, and if the plan does not qualify, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the date of denial of qualification of the plan.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of Title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a contribution which would otherwise be an excess contribution (as defined in section 4972(b) of Title 26) paragraph (1) shall not prohibit a correcting distribution with respect to such contribution from the plan to the employer to the extent permitted in such section to avoid payment of an excise tax on excess contributions under such section.

Appendix I.

Termination of plan

(d)(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

Pub.L. 93—406, Title I, § 403, Sept. 2, 1974, 88 Stat. 876.

§ 1104. FIDUCIARY DUTIES

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by

reason of any breach, which results from such participant's or beneficiary's exercise of control.

Pub.L. 93—406, Title I, § 404, Sept. 2, 1974, 88 Stat. 877.

§ 1105. LIABILITY FOR BREACH OF CO-FIDUCIARY

Circumstances giving rise to liability

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Assets held by two or more trustees

(b)(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3) (A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than

named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104 (a) (1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c) (3) of this title.

Appendix I.

Investment managers

(d)(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

Pub.L. 93—406, Title I, § 405, Sept. 2, 1974, 88 Stat. 878.

§ 1106. PROHIBITED TRANSACTIONS

(a) Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

Pub.L. 93—406, Title I, § 406, Sept. 2, 1974, 88 Stat. 879.

§ 1107. LIMITATION WITH RESPECT TO ACQUISITION AND HOLDING OF EMPLOYER SECURITIES AND EMPLOYER REAL PROPERTY BY CERTAIN PLANS

Percentage limitation

(a) Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold—

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) a plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3) (A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of—

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(B) Subparagraph (A) of this paragraph shall not apply to any plan which on any date after

December 31, 1974; and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of

(i) the fair market value of the assets of the plan, determined on such date, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(4) (A) After December 31, 1979, a plan may not hold any employer securities or employer real property in excess of the amount specified in regulations under subparagraph (B). This subparagraph shall not apply to a plan after the earliest date after December 31, 1974, on which it complies with such regulations.

(B) Not later than December 31, 1976, the Secretary shall prescribe regulations which shall have the effect of requiring that a plan divest itself of 50 percent of the holdings of employer securities and employer real property which the plan would be required to divest before January 1, 1985, under paragraph (2) or subsection (c) of this section (whichever is applicable).

Exception

(b) (1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

(2) Cross References.—

(A) For exemption from diversification requirements for holding of qualifying employer se-

curities and qualifying employer real property by eligible individual account plans, see section 1104 (a)(2) of this title.

(B) For exemption from prohibited transactions for certain acquisitions of qualifying employer securities and qualifying employer real property which are not in violation of 10 percent limitation, see section 1108(e) of this title.

(C) For transitional rules respecting securities or real property subject to binding contracts in effect on June 30, 1974, see section 1114(c) of this title.

Election

(c)(1) A plan which makes the election, under paragraph (3) shall be treated as satisfying the requirement of subsection (a)(3) of this section if and only if employer securities held on any date after December 31, 1974 and before January 1, 1985 have a fair market value, determined as of December 31, 1974, not in excess of 10 percent of the lesser of—

(A) the fair market value of the assets of the plan determined on such date (disregarding any portion of the fair market value of employer securities which is attributable to appreciation of such securities after December 31, 1974) but not less than the fair market value of plan assets on January 1, 1975, or

(B) an amount equal to the sum of (i) the total of the contributions to the plan received after December 31, 1974, and prior to such date, plus (ii)

the fair market value of the assets of the plan, determined on January 1, 1975.

(2) For purposes of this subsection, in the case of an employer security held by a plan after January 1, 1975, the ownership of which is derived from ownership of employer securities held by the plan on January 1, 1975, or from the exercise of rights derived from such ownership, the value of such security held after January 1, 1975, shall be based on the value as of January 1, 1975, of the security from which ownership was derived. The Secretary shall prescribe regulations to carry out this paragraph.

(3) An election under this paragraph may not be made after December 31, 1975. Such an election shall be made in accordance with regulations prescribed by the Secretary, and shall be irrevocable. A plan may make an election under this paragraph only if on January 1, 1975, the plan holds no employer real property. After such election and before January 1, 1985 the plan may not acquire any employer real property.

Definitions

(d) For purposes of this section—

(1) The term "employer security" means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. A contract to which section 1108(b)(5) of this title applies shall not be treated as a security for purposes of this section.

(2) The term "employer real property" means real property (and related personal property) which

is leased to an employer of employees covered by the plan, or to an affiliate of such employer. For purposes of determining the time at which a plan acquires employer real property for purposes of this section, such property shall be deemed to be acquired by the plan on the date on which the plan acquires the property or on the date on which the lease to the employer (or affiliate) is entered into, whichever is later.

(3) (A) The term "eligible individual account plan" means an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974 and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of Title 26.

(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer real property or qualifying employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property (as the case may be). In the case of a plan in existence on September 2, 1974, this sub-paragraph shall not take effect until January 1, 1976.

(4) The term "qualifying employer real property" means parcels of employer real property—

(A) if a substantial number of the parcels are dispersed geographically;

(B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use;

(C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and

(D) if the acquisition and retention of such property comply with the provisions of this part (other than section 1104(a)(1)(B) of this title to the extent it requires diversification, and sections 1104(a)(1)(C), 1106 of this title, and subsection (a) of this section).

(5) The term "qualifying employer security" means an employer security which is stock or a marketable obligation (as defined in subsection (e) of this section).

(6) The term "employee stock ownership plan" means an individual account plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employee securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

(7) A corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of Title 26, except that "applicable percentage" shall be sub-

stituted for "80 percent" wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation. A person other than a corporation shall be treated as an affiliate of an employer to the extent provided in regulations of the Secretary. An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary. Regulations under this paragraph shall be prescribed only after consultation and coordination with the Secretary of the Treasury.

(8) The Secretary many prescribe regulations specifying the extent to which conversions, splits, the exercise of rights, and similar transactions are not treated as acquisitions.

Marketable obligations

(e) For purposes of subsection (d) (5) of this section, the term "marketable obligation" means a bond, debenture, note, or certificate, or other evidence of indebtedness (hereinafter in this subsection referred to as "obligation") if—

(1) such obligation is acquired—

(A) on the market, either (i) at the price of the obligation prevailing on a national securities exchange which is registered with the Securities and Exchange Commission, or (ii) if the obligation is not traded on such a national

securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer;

(B) from an underwriter, at a price (i) not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or

(C) directly from the issuer, at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issued by persons independent of the issuer;

(2) immediately following acquisition of such obligation—

(A) not more than 25 percent of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer; and

(3) immediately following acquisition of the obligation, not more than 25 percent of the assets of the plan is invested in obligations of the employer or an affiliate of the employer.

Pub.L. 93-406, Title I, § 407, Sept. 2, 1974, 88 Stat. 880.

§ 1108. EXEMPTIONS FROM PROHIBITED TRANSACTIONS

Grant of exemptions

(a) The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

Appendix I.

Enumeration of transactions exempted from section 1106 prohibitions

(b) The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees, officers, or shareholders in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provison of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations writ-

ten by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The proving of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as defined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert se-

curities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of and insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

Fiduciary benefits and compensation not prohibited by section 1106

(c) Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

Owner-employees; family members; shareholder employees

(d) Section 1107(b) of this title and subsections (a), (b) (c), and (e) of this section shall not apply to any transaction in which a plan, directly or indirectly—

(1) lends any part of the corpus or income of the plan to;

(2) pays any compensation for personal services rendered to the plan to; or

(3) acquires for the plan any property from or sells any property to;

any person who is with respect to the plan an owner-

employee (as defined in section 401(c)(3) of Title 26), a member of the family (as defined in section 267(c)(4) of Title 26) of any such owner-employee, or a corporation controlled by any such owner-employee, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation. For purposes of this subsection a shareholder employee (as defined in section 1379 of Title 26) and a participant or beneficiary of an individual retirement account, individual retirement annuity, or an individual retirement bond (as defined in section 408 or 409 of Title 26) and an employer or association of employers which establishes such an account or annuity under section 408(c) of Title 26 shall be deemed to be an owner-employee.

Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

(e) Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

Pub.L. 93-406, Title I, § 408, Sept. 2, 1974, 88 Stat. 883.

§ 1109. LIABILITY FOR BREACH OF FIDUCIARY DUTY

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profit of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

Pub.L. 93-406, Title I, § 409, Sept. 2, 1974, 88 Stat. 886.

§ 1110. EXCULPATORY PROVISIONS; INSURANCE

(a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

Pub.L. 93-406, Title I, § 410, Sept. 2, 1974, 88 Stat. 886.

§ 1111. PERSONS PROHIBITED FROM HOLDING CERTAIN POSITIONS

Conviction or imprisonment

(a) No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of

Title 21, murder, rape, kidnapping, perjury, assault with intent to kill, any crime described in section 80a-9 (a) (1) of Title 15, a violation of any provision of this Act, a violation of section 186 of Tile 29, a violation of chapter 63 of Title 18. a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of Title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—

(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or

(2) as a consultant to any employee benefit plan,

during or for five years after such conviction or after the end of such imprisonment, whichever is the later, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in paragraph (1) or (2) would not be contrary to the purposes of this subchapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such p oceeding shall be final. No person shall knowingly permit any other person to serve in any capacity re-

ferred to in paragraph (1) or (2) in violation of this subsection. Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee, of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing, and determination by such Board of Parole that such service would be inconsistent with the intention of this section.

Penalty

(b) Any person who intentionally violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Definitions

(c) For the purpose of this section:

(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event.

(2) The term "consultant" means any person who, for compensation, advises or represents an employee benefit plan or who provides other assistance to such plan, concerning the establishment or operation of such plan.

(3) A period of parole shall not be considered as part of a period of imprisonment.

Pub.L. 93-406, Title I, § 411, Sept, 2, 1974, 88 Stat. 887.

§ 1112. BONDING

Requisite bonding of plan officials

(a) Every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan (hereafter in this section referred to as "plan official") shall be bonded as provided in this section; except that—

(1) where such plan is one under which the only assets from which benefits are paid are the general assets of a union or of an employer, the administrator, officers, and employees of such plan shall be exempt from the bonding requirements of this section, and

(2) no bond shall be required of a fiduciary (or of any director, officer, or employee of such fiduciary) if such fiduciary—

(A) is a corporation organized and doing business under the laws of the United States or of any State;

(B) is authorized under such laws to exercise trust powers or to conduct an insurance business;

(C) is subject to supervision or examination by Federal or State authority; and

(D) has at all times a combined capital and surplus in excess of such a minimum amount as may be established by regulations issued by the Secretary, which amount shall be at least $1,000,000. Paragraph (2) shall apply to a bank or other financial institution which is authorized to exercise trust powers and the deposits of which are not insured by the Federal Deposit Insurance Corporation, only

if such bank or institution meets bonding or similar requirements under State law which the Secretary determines are at least equivalent to those imposed on banks by Federal law.

The amount of such bond shall be fixed at the beginning of each fiscal year of the plan. Such amount shall be not less than 10 per centum of the amount of funds handled. In no case shall such bond be less than $1,000 nor more than $500,000, except that the Secretary, after due notice and opportunity for hearing to all interested parties, and after consideration of the record, may prescribe an amount in excess of $500,000, subject to the 10 per centum limitation of the preceding sentence. For purposes of fixing the amount of such bond, the amount of funds handled shall be determined by the funds handled by the person, group, or class to be covered by such bond and by their predecessor or predecessors, if any, during the preceding reporting year, or if the plan has no preceding reporting year, the amount of funds to be handled during the current reporting year by such person, group, or class, estimated as provided in regulations of the Secretary. Such bond shall provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official, directly or through connivance with others. Any bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 6 through 13 of Title 6. Any bond shall be in a form or of a type approved by the Secretary, including individual bonds or schedule of blanket forms of bonds which cover a group or class.

Appendix I.

Unlawful acts

(b) It shall be unlawful for any plan official to whom subsection (a) of this section applies, to receive, handle, disburse, or otherwise exercise custody or control of any of the funds or other property of any employee benefit plan, without being bonded as required by subsection (a) of this section and it shall be unlawful for any plan official of such plan, or any other person having authority to direct the performance of such functions, to permit such functions, or any of them, to be performed by any plan official, with respect to whom the requirements of subsection (a) of this section have not been met.

Conflict of interest prohibited in procuring bonds

(c) It shall be unlawful for any person to procure any bond required by subsection (a) of this section from any surety or other company or through any agent or broker in whose business operations such plan or any party in interest in such plan has any control or significant financial interest, direct or indirect.

Exclusiveness of statutory basis for bonding requirement for persons handling funds or other property of employee benefit plans

(d) Nothing in any other provision of law shall require any person, required to be bonded as provided in subsection (a) of this section because he handles funds or other property of an employee benefit plan, to be bonded insofar as the handling by such person of the funds or other property of such plan is concerned.

(e) The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section including exempting a plan from the requirements of this section where he finds that (1) other bonding arrangements or (2) the overall financial condition of the plan would be adequate to protect the interests of the beneficiaries and participants. When, in the opinion of the Secretary, the administrator of a plan offers adequate evidence of the financial responsibility of the plan, or that other bonding arrangements would provide adequate protection of the beneficiaries and participants, he may exempt such plan from the requirements of this section.

Pub.L. 93-406, Title I, § 412, Sept. 2, 1974, 88 Stat. 888.

§ 1113. LIMITATION OF ACTIONS

(a) No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this subchapter;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

Pub.L. 93-406, Title I, § 413, Sept. 2, 1974, 88 Stat. 889.

§ 1114. EFFECTIVE DATE

(a) Except as provided in subsections (b), (c), and (d) of this section, this part shall take effect on January 1, 1975.

(b)(1) The provisions of this part authorizing the Secretary to promulgate regulations shall take effect on September 2, 1974.

(2) Upon application of a plan, the Secretary may postpone until not later than January 1, 1976, the applicability of any provision of sections 1102, 1103 (other than 1103(c)), 1105 (other than 1105(a) and (d)), and 1110(a) of this title, as it applies to any plan in existence on September 2, 1974 if he determines such postponement is (A) necessary to amend the instrument establishing the plan under which the plan is maintained and (B) not adverse to the interest of participants and beneficiaries.

(3) This part shall take effect on September 2, 1974 with respect to a plan which terminates after June 30, 1974, and before January 1, 1975, and to which at the time of termination section 1321 of this title applies.

(c) Section 1106 and 1107(a) of this title (relating to prohibited transactions) shall not apply—

(1) until June 30, 1984, to a loan of money or other extension of credit between a plan and a party in interest under a binding contract in effect on July

1, 1974 (or pursuant to renewals of such a contract), if such loan or other extension of credit remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be, and if the execution of the contract, the making of the loan, or the extension of credit was not, at the time of such execution, making, or extension, a prohibited transaction (within the meaning of section 503(b) of Title 26 or the corresponding provisions of prior law);

(2) until June 30, 1984, to a lease or joint use of property involving the plan and a party in interest pursuant to a binding contract in effect on July 1, 1974 (or pursuant to renewals of such a contract), if such lease or joint use remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if the execution of the contract was not, at the time of such execution, a prohibited transaction (within the meaning of section 503(b) of Title 26) or the corresponding provisions of prior law;

(3) until June 30, 1984, to the sale, exchange, or other disposition of property described in paragraph (2) between a plan and a party in interest if—

(A) in the case of a sale, exchange, or other disposition of the property by the plan to the party in interest, the plan receives an amount which is not less than the fair market value of the property at the time of such disposition; and

(B) in the case of the acquisition of the property by the plan, the plan pays an amount

which is not in excess of the fair market value of the property at the time of such acquisition;

(4) Until June 30, 1977, to the provision of services, to which paragraphs (1), (2), and (3) do not apply between a plan and a party in interest—

(A) under a binding contract in effect on July 1, 1974 (or pursuant to renewals of such contract), or

(B) if the party in interest ordinarily and customarily furnished such services on June 30, 1974, if such provision of services remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if such provision of services was not, at the time of such provision, a prohibited transaction (within the meaning of section 503(b) of Title 26) or the corresponding provisions of prior law; or

(5) the sale, exchange, or other disposition of property which is owned by a plan on June 30, 1974, and all times thereafter, to a party in interest, if such plan is required to dispose of such property in order to comply with the provisions of section 1107(a) of this title (relating to the prohibition against holding excess employer securities and employer real property), and if the plan receives not less than adequate consideration.

(d) Any election, or failure to elect, by a disqualified person under section 2003(c)(1)(B) of this Act shall be treated for purposes of this part (but not for purposes of section 1144 of this title) as an act or omission occurring before the effective date of this part.

Pub.L. 93-406, Title I, § 414, Sept. 2, 1974, 88 Stat. 889.

APPENDIX J

Relevant portions of Subchapter II of the National Labor Relations Act of July 5, 1935, 49 Stat. 452, 29 U.S.C. §§ (b)(1)(B), (b)(3), (b)(4) and (e) as amended.

* * * * * *

§ 158. UNFAIR LABOR PRACTICES

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles,

materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided, further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

* * * * * *

Office-Supreme Court, U.S.
FILED
MAR 6 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-289 and 80-692

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD

and

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
AND UNITED MINE WORKERS OF AMERICA

—*v.*—

AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

PETITION FOR CERTIORARI IN NO. 80-289 FILED AUGUST 26, 1980
PETITION FOR CERTIORARI IN NO. 80-692 FILED OCTOBER 27, 1980
CERTIORARI GRANTED JANUARY 19, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-289 and 80-692

NATIONAL LABOR RELATIONS BOARD

and

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
AND UNITED MINE WORKERS OF AMERICA

—*v.*—

AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Case No.: 27-CB-900 & 27-CC-571

IN THE MATTER OF:

AMAX COAL COMPANY A DIVISION OF AMAX INC., ET AL.

1.8.75 Charge filed in Case No. 27-CB-900

1.14.75 Amended Charge filed in Case No. 27-CB-900

1.27.75 Charge filed in Case No. 27-CC-571 .....

2.14.75 Complaint and Notice of Hearing in Case No. 27-CB-900, dated

2.24.75 Regional Director's Notice of Change of Place of Hearings, in Case No. 27-CB-900, dated

2.27.75 Petitioner [1] Unions' Answer, in Case No. 27-CB-900, received

2.27.75 Petitioner Union's Motion to Change the Site of the Hearing, in Case No. 27-CB-900, dated

3.4.75 Judge James T. Barkers telegram denying Motion, in Case No. 27-CB-900, dated

3.4.75 Petitioner Unions' Motion for Postponement of Hearing, in Case No. 27-CB-900, dated

3.5.75 Unions' telegram requesting that the Regional Director consider UMWA's Motion for change of Hearing site, in Case No. 27-CB-900, dated

3.5.75 General Counsel second telegram asking for a prompt decision regarding motion to change site of hearing, in Case No. 27-CB-900, dated

---

[1] Petitioner Unions herein were the Respondents before the Board.

3.5.75 Petitioner Employer's Motion in Opposition to Petitioners' Unions Motion to Change the site of the Hearing in Case No. 27-CB-900, dated

3.6.75 Regional Director's telegram denying Motion, of Unions' in Case No. 27-CB-900, dated

3.10.75 Regional Director's telegram Postponing Hearing Indefinitely, in Case No. 27-CB-900, dated

3.18.75 Regional Director's Order Rescheduling Hearing in Case No. 27-CB-900, dated

4.22.75 Regional Director's Complaint and Notice of Hearing in Case No. 27-CC-571, dated

4.23.75 Regional Director's Order Consolidating Cases in Case Nos. 27-CB-900, and 27-CC-571, dated

4.23.75 Second Amended Charge in Case No. 27-CB-900, dated

4.28.75 Unions' telegram request postponement of Hearing, in Case Nos. 27-CB-900, and 27-CC-571, dated

4.30.75 Union's Motion to Postpone Hearing in Case Nos. 27-CB-900, and 27-CC-571, dated

4.30.75 Regional Director's telegram Postponing Hearing in Case Nos. 27-CB-900, 27-CC-571, dated

5.2.75 Unions' Answer in Case No. 27-CC-571, dated

7.3.75 First Amended Charge filed in Case No. 27-CC-571.

7.3.75 Third Amended Charge filed in Case No. 27-CB-900

1.27.76 New Acme's Motion to Intervene in Case Nos. 27-CB-900, and 27-CC-571, dated

2.3.76 Acting Regional Director's Order Denying Motion in Case Nos. 27-CB-900 and 27-CC-571

2.12.76 Acting Regional Director's Order Consolidating Cases, and Amended Complaint and Notice of Hearing in Case Nos. 27-CB-900, and 27-CC-571, and 27-CB-941, dated

2.23.76 Regional Director's Order Extending Time in Which to File Answer, dated

3.25.76 Regional Director's Amendment to Amended Complaint, and Order Rescheduling Hearing, denied

4.2.76 Petitioner Unions' Answer to Order Consolidating Cases, Amended Complaint and Notice of Hearing as Amended by Amendment to Amended Complaint and Order Rescheduling Hearing, dated

6.21.76 Regional Director's Order Transferring Motions, dated

6.22.76 Hearing opened

6.24.76 General Counsel's Motion to Amend Complaint, dated

7.15.76 Hearing closed

3.22.77 Administrative Law Judge's Decision issued

6.27.77 Petitioner Employer's [2] Exceptions, received

6.27.77 Petitioner Unions' Exceptions to Administrative Law Judge's Decision, received

7.18.77 General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision and Recommended Order, received

7.18.77 Petitioner Unions' request for oral argument, dated

4.27.77 Petitioner Unions' renewed request for oral argument, dated

unknown Petitioner Unions' motion to correct transcript

unknown Petitioner Employer's request to argue orally, denied

9.27.78 Decision and Order issued by the National Labor Relations Board

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[2] Petitioner Employer herein was Charging Party before the Board.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

Cases Nos. 27-CB-900
27-CB-571
27-CB-941

Feb. 17, 1976

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA

and

AMAX COAL COMPANY

ORDER CONSOLIDATING CASES, AMENDED COMPLAINT AND NOTICES OF HEARING

It having been charged in Case No. 27-CB-900, Case No. 27-CC-571, and Case No. 27-CB-941, by Amax Coal Company (herein called the Employer) that United Mine Workers of America, Local No. 1854, and United Mine Workers of America, (herein called Local 1854, and UMWA, respectively and Respondents jointly), have engaged in and are engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.*, 73 Stat. 519 (herein called the Act), and Complaints having issued in Case No. 27-CB-900 on February 14, 1975, and in Case No. 27-CC-571 on April 22, 1975, and in Case No. 27-CB-941 on August 15, 1975, and Cases Nos. 27-CB-900 and 27-CC-571 having previously been consolidated on April 23, 1975, the General Counsel of the National Labor Relations Board (herein called the Board), by the undersigned Acting Regional Director for the Twenty-Seventh Region, having duly

considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

HEREBY ORDERED, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated, the undersigned Acting Regional Director for the Twenty-Seventh Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Amended Complaint and Notice of Hearing and alleges as follows:

I

(a) The Original Charge in Case No. 27-CB-900 was filed by the Employer on January 8, 1975, and served on Respondents on January 9, 1975, by registered mail.

(b) The First Amended Charge in Case No. 27-CB-900 was filed by the Employer on January 14, 1975, and served on Respondents on the same day by registered mail.

(c) The Second Amended Charge in Case No. 27-CB-900 was filed by the Employer on April 23, 1975, and served on Respondents on the same day by registered mail.

(d) The Third Amended Charge in Case No. 27-CB-900 was filed by the Employer on July 3, 1975, and served on Respondents on the same day by registered mail.

(e) The Original Charge in Case No. 27-CC-571 was filed by the Employer on January 27, 1975, and served on Respondents on the same day by registered mail.

(f) The First Amended Charge in Case No. 27-CC-571 was filed by the Employer on July 3, 1975, and served on Respondents on the same day by registered mail.

(g) The Charge in Case No. 27-CB-941 was filed by the Employer on May 29, 1975, and served on Respondents on the same day by registered mail.

II

(a) The Employer is now, and at all times material herein has been, a corporation duly organized under and existing by virtue of the laws of the State of New York, and maintains its principal office and place of business near Gillette, Wyoming, know as the Belle Ayr Mine.

(b) The Employer is now, and at all times material herein has been, engaged at the Belle Ayre Mine in the production of coal.

(c) The Employer, in the course and conduct of its business operations at the Belle Ayre Mine annually sells and ships goods and materials valued in excess of $50,000 directly to points and places outside the State of Wyoming.

(d) Peabody Coal Company, Energy Fuels Corporation, Big Horn Coal Company, Consolidation Coal Company, Energy Coal Company, Kemmerer Coal Company, the North American Coal Corporation, Pittsburg & Midway Coal Mining Company, Usibelli Coal Mine, Inc., among others (all referred to as the Peabody Group) are employers engaged in the mining and sale of coal, and have joined together into a multi-employer bargaining association for the purposes of joint negotiations for the purpose of collective bargaining regarding the wages, hours, terms and conditions of employment of their employees, with Respondents.

(e) The Employer is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

III

The Respondents are now, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

IV

At all times material herein, the following-named persons occupied the position set opposite their respective names, and have been, and are now, agents of the Respondents, acting on their behalf and are agents within the meaning of Section 2(13) of the Act:

Arnold Miller	— President, UMWA
Duke Grant	— President, Local 1854
Roy Casady	— Recording Secretary, Local 1854
James P. Marketti	— Western Regional Director, UMWA
Billie L. Halbrook	— President, Local 1854
Merrill Thornock	

V

Since on or about March 1, 1975, and continuing to date, Respondents have interfered with, restrained and coerced, and are interfering with, restraining and coercing, employees in the exercise of rights guaranteed in Section 7 of the Act, by the following acts and conduct occurring at the Belle Ayre Mine near Gillette, Wyoming.

(a) Since on or about May 1, 1975, Respondents, acting by and through Duke Grant, Roy Casady, and other authorized representatives, established a picket line at the Employer's Belle Ayr Mine near Gillette, Wyoming, in which the pickets and vehicles belonging to the pickets obstructed, blocked and prevented ingress and egress of employees, customers and other persons from entering the Employer's premises.

(b) Since on or about May 1, 1975, Respondents, acting by and through Duke Grant, Roy Casady, and other authorized representatives, have threatened employees with injury and damage to property if they should attempt to enter or leave the Employer's premises.

(c) Since on or about May 1, 1975, Respondents, acting by and through Duke Grant, Roy Casady, and other authorized representatives, damaged and attempted to cause damage to motor vehicles and other property of individuals including employees who attempted to enter and leave the Employer's property.

VI

Commencing on or about November 2, 1974 and continuing to date, Respondents, by their officers, agents and representatives, have restrained and coerced, and are restraining and coercing the Employer in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances, by the following acts and conduct:

(a) Since on or about January 6, 1975, as a part of their contract proposal for a proposed collective bargaining agreement, Respondents have adamantly insisted on the inclusion of a Training Clause, Article XV Section (a), which clause provides for representatives for the purposes of collective bargaining, which are not selected by the Employer.

(b) Since on or about January 6, 1975, as a part of their contract proposal, Respondents have adamantly insisted on the inclusion of Pension and Health and Welfare Trusts provisions, by the terms of which the trustees of those trusts, who would be collective bargaining representatives, would not be selected by the Employer.

(c) On or about November 2, 1974, and thereafter, Respondents, by threat of strike, attempted to coerce the Employer in its selection of its collective bargaining representative, by offering to extend the existing agreement if the Employer would agree to bargain through an employer-association, the so-called Peabody group.

VII

All production and maintenance employees employed by the Employer at the Belle Ayr Mine near Gillette, Wyoming, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

VIII

Since on or about March 27, 1972, a majority of the employees of the Employer in the unit described above in paragraph VII, designated or selected the Respondents as their representative for the purposes of collective bargaining with the Employer.

IX

On or about November 22, 1974, a majority of the employees of the Employer in the unit described above in paragraph VII, by a secret ballot election conducted under the supervision of the Regional Director for the Twenty-Seventh Region of the National Labor Relations Board, designated and selected Respondent Local 1854 as their representative for the purposes of collective bargaining with the Employer and on or about December 9, 1974, said Regional Director certified the Respondent Local 1854 as the exclusive collective bargaining representative of the employees in said unit.

X

At all times since March 27, 1972, and specifically since December 9, 1974, and continuing to date, Respondent Local 1854 has been the representative for the purposes of collective bargaining of the employees in the unit described above in paragraph VII, and by virtue of Section 9(a) of the Act, has been and is now, the exclusive representative of all of the employees in said unit for the purposes of collective bargaining with respect to

rates of pay, wages, hours of employment, and other terms and conditions of employment.

XI

Since on or about November 23, 1974, and continuing to date, the Employer requested, and is requesting, Respondent Local 1854 to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective bargaining representative of all the employees of the Employer in the unit described above in paragraph VII.

XII

On or about March 27, 1972, Respondents entered into a collective bargaining agreement with the Employer relating to the terms and conditions of employment of the employees in the unit described above in paragraph VII, said contract to be effective until November 12, 1974, though later extended by Respondents until January 12, 1975.

XIII

On or about September 10, 1972, Respondents served notice upon the Employer of its desire to modify or terminate the contract referred to above in paragraph XII.

XIV

On or about January 13, 1975, Respondents engaged in a strike, and since that date have been engaging in said strike over its dispute with the Employer, in order to compel the Employer to bargain through a multi-employer association, the Peabody Group, notwithstanding that the Employer has not bound itself to any multi-employer association for the purposes of collective bargaining.

XV

An object of the acts and conduct engaged in by Respondents described in paragraph XIV above, has been to force and require the Employer to join and be represented by an employer organization for purposes of collective bargaining regarding labor relations and employment conditions of the Employer's employees.

XVI

At no time since the reopening of the contract described in paragraph XII above, have Respondents given notice to the Federal Mediation and Conciliation Service and to the Department of Labor and Statistics, of the State of Wyoming, pursuant to Section 8(d)(3) of the Act, of its desire to terminate or modify its contract with the Employer described above in paragraph XI and/or of the existence of a dispute between Respondents and the Employer.

XVII

Since on or about January 6, 1975, and at all times thereafter, the Respondents have refused and continue to refuse to bargain collectively with the Employer, as the exclusive collective bargaining representative of all the employees in the unit described above in paragraph VII in that:

(a) On or about January 13, 1975, Respondents engaged in a strike and since that date have been engaging in said strike over its dispute with the Employer, in order to compel the Employer to bargain through a multi-employer association, notwithstanding that the Employer has not bound itself to any multi-employer association for the purposes of coliective bargaining.

(b) Since on or about January 6, 1975, until on or about February 3, 1975, the Respondents have refused to meet and bargain with the Employer concerning wages, hours, and other terms and conditions of employ-

ment of the employees in the union described above in paragraph VII.

(c) Since on or about January 13, 1975, Respondents engaged in the strike described in paragraph XIV above, without having notified the appropriate federal mediation agency as described in paragraph XVI above, for the purpose of modifying or terminating the contract referred to in paragraph XII above.

(d) Since on or about January 6, 1975, as a part of their contract proposal, Respondents have adamantly insisted on the inclusion of the following clause in the proposed collective bargaining agreement;

Article I Enabling Clause

> . . . This Agreement shall be binding upon all signatories hereto, and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement. Provided that the Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this Agreement.

(e) Since on or about January 6, 1975, as a part of their contract proposal, Respondents have adamantly insisted on the inclusion of the following "union signatory" clauses:

> Article II
>
> Scope and Coverage
>
> . . .

Section (g) Contracting and Subcontracting

(1) Transportation of Coal—The transportation of coal as defined in paragraph (a) may be contracted out only to a contractor employing members of the UMWA under this Agreement and only where contracting out such work is consistent with the prior practice and custom of the Employer.

(2) Repair and Maintenance Work—Repair and maintenance work customarily performed by classified Employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty, or (b) where the Employer does not have available equipment or regular Employees with necessary skills available to perform the work at the mine or central shop, provided, however, that the work shall be performed by UMWA members to the extent and in the manner permitted by law.

(f) Since on or about January 6, 1975, as a part of their contract proposal, Respondent's have adamantly insisted on the inclusion of the following Work Jurisdiction clause:

Article II Scope and Coverage

Section (a) Work Jurisdiction

The production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal in and around the mine and to a screening, crushing, washing or other preparation facility or other mine-related operation (except by waterway or rail not owned by Employer), repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of gob piles and mine roads, and work customarily related to all of the above shall be performed by classified Employees of the Employer covered by and in accord-

ance with the terms of this Agreement. Contracting, subcontracting, leasing and subleasing, and construction work, as defined herein, will be conducted in accordance with the provisions of this Article.

Nothing in this section will be construed to diminish the jurisdiction express or implied, of the United Mine Workers.

(g) Since on or about January 6, 1975, as a part of their contract proposal, Respondents have adamantly insisted on the inclusion of the following Coal Lands clause, which clause applies to matters outside the scope of and not germane to the contract unit:

Article II Scope and Coverage

Section (f) Application of this Contract to the Employer's Coal Lands

As a part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities identified in Article I which are owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use.

(h) Since on or about January 6, 1975, as a part of their contract proposal, Respondents have adamantly insisted on the inclusion of the following Training clause, which provides for representatives not selected by the Employer:

Article XV Training

Section (a) Priority

The parties agree that the establishment of effective training programs for Employees is essential to safe and efficient production of coal. Toward that end there shall be established a Joint Western Sur-

face Mining Industry Training Committee which shall consist of 3 representatives appointed by the United Mine Workers of America and 3 representatives of the industry, appointed by the Employers. This committee shall meet primarily for the purpose fostering and promoting the advancement of effective training in the industry.

. . .

(i) Since on or about January 6, 1975, Respondents have conditioned the reaching of agreement on a contract on the Employer's withdrawal of all litigation, including the unfair labor practice charges herein.

(j) Since on or about January 6, 1975, Respondents, as a part of their contract proposal, have adamantly insisted on the inclusion of Pension and Health and Welfare Trusts provisions, by the terms of which the trustees of those trusts, who would be collective bargaining representatives, would not be selceted by the Employer.

(k) Since on or about January 6, 1975, and at all times thereafter to date, Respondents have engaged in surface bargaining, negotiating with the Employer in bad faith and with no intention of entering into any final or binding collective-bargaining agreement, in that Respondents have exhibited a predetermined resolve not to agree to any proposal but their own.

XVIII

Commencing on or about January 13, 1975, and continuing to date, Respondents, by their officers, agents, and representatives have engaged in, and are engaging in, and by picketing, requests, appeals, orders, instructions, and other means have induced and encouraged, and are inducing and encouraging, employees of the Employer and other persons engaged in commerce or in industries affecting commerce, to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work

on any goods, articles, materials, or commodities, or to perform services for their respective employers, and have threatened, coerced and restrained other persons engaged in commerce or in industries affecting commerce, where an object thereof is to force or require the Employer to enter into an agreement, provisions of which are prohibited by Section 8(e) of the Act, those prohibited provisions being those recited in paragraph XVII(d), (e), and (f), above.

XIX

By the acts described above in paragraph V, Respondents did restrain and coerce, and are restraining and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

XX

By the acts described above in paragraph VI, Respondents did restrain and coerce, and are restraining and coercing an Employer, Amax Coal Company, in the selection of its representatives for the purposes of collective bargaining, and thereby did engage in, and are engaging in, unfair labor practices affecting commerce, within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the Act.

XXI

By the acts described above in paragraph XVII, and by each of said acts, Respondents did refuse to bargain collectively, and are refusing to bargain collectively, with the Employer, and thereby did engage in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

XXII

By the acts and conduct described in pargraph XVII above, for the objective described in paragraph XVIII above, and by the acts and conduct described in paragraph XIV above, for the objective described in paragraph XV above, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(A), and Section 2(6) and (7) of the Act.

XXIII

By the acts and conduct described in paragraph XVI above, the Respondents have engaged in unfair labor practices within the meaning of Section 8(d)(2) and Section 2(6) and (7) of the Act.

XXIV

The acts and conduct of Respondents, set forth in paragraph V, VI, XVII and XVIII, occurring in connection with the operations of the Employer, as set forth in paragraph II hereof, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several states and tend to lend to labor disputes burdening and obstructing commerce and the free flow of commerce.

XXVI

The acts of Respondents constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A), 8(b)(3), 8(b)(4)(i)(ii)(A), 8(d)(3) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 30th day of March, 1976 at 10:00 a.m. (MDT) at

Room 260 New Custom House
721 19th Street
Denver, Colorado

a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board, on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person or otherwise, and give testimony. Form NLRB-4660, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, as Amended, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondents shall file with the undersigned Acting Regional Director, acting in this matter as agent for the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immeiately upon the filing of its Answer, Respondents shall serve a copy thereof on each of the other parties.

Dated at Denver, Colorado this 12th day of February, 1976.

[SEAL]

/s/ W. Bruce Gillis, Jr.
W. BRUCE GILLIS, JR.
Acting Regional Director
National Labor Relations Board
Region 27
260 New Custom House
721 19th Street
Denver, Colorado 00202

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

Cases Nos. 27-CB-900
27-CC-571
27-CB-941

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, and UNITED MINE WORKERS OF AMERICA

and

AMAX COAL COMPANY, A DIVISION OF AMAX INC.

AMENDMENT TO AMENDED COMPLAINT, AND ORDER RESCHEDULING HEARING

WHEREAS, an Order Consolidating Cases, Amended Complaint and Notice of Hearing having previously been issued in the above-entitled cases on February 12, 1976, by the Acting Regional Director for the Twenty-Seventh Region;

NOW, THEREFORE, pursuant to Section 102.17 of the Rules and Regulations of the National Labor Relations Board, Series 8, as Amended, the undersigned Regional Director hereby issues this Amendment to Amended Complaint, and Order Rescheduling Hearing, wherein the Amended Complaint is further amended, and the Hearing herein is rescheduled, as follows:

1. The name of the Employer is corrected to reflect the correct legal corporate title, i.e., Amax Coal Company, A Division of Amax Inc., in the caption of the Amended Complaint, as well as in line 2, paragraph 1, page one, of the Amended Complaint, and at any other point in the Amended Complaint where the name of the Employer is listed only as Amax Coal Company.

2. Delete from line 3, paragraph II(a) of the Amended Complaint the words ". . . its principal . . .", substituting therefor the word "an".

3. Add the following to the end of line 3, paragraph XVII(d), on page 8 of the Amended Complaint, changing the semicolon at the end of line 3 to a comma: ". . . which is in violation of Section 8(e) of the Act;"

4. Add the following to the end of line 3, paragraph XVII(e), on page 8 of the Amended Complaint, changing the semicolon at the end of line 3 to a comma: ". . . which are violative of Section 8(e) of the Act;"

5. Add the following to the end of line 3, paragraph XVII(f), on page 9 of the Amended Complaint, changing the semicolon at the end of line 3 to a comma: ". . . which is violative of Section 8(e) of the Act when it is read in conjunction with paragraph (g), Article II, of the proposed agreement, which is recited in paragraph XVII(e) of the Amended Complaint."

6. Insert the following language in paragraph XVII (g) on page 9 of the Amended Complaint, in line 3 after the phrase "which clause": ". . . is a non-mandatory subject for bargaining and . . ."

7. Insert the following language in paragraph XVII (h), on page 9 of the Amended Complaint, in line 3 after the word "which": ". . . is a non-mandatory subject for bargaining and . . ."

8. Substitute the following for line 13, the final line, of paragraph XVIII, page 10 of the Amended Complaint: ". . . being those recited in paragraph XVII(d) and (e), and (f) when read in conjunction with paragraph (g), Article II, of the proposed agreement, which is recited in paragraph XVII(e) of the Amended Complaint."

9. Insert the following language in paragraph XX, on page 11 of the Amended Complaint, in line 1, following the comma after the Roman numeral "VI": ". . . and in paragraph XVII(a), (h), and (j) . . ."

PLEASE TAKE NOTICE that pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations,

Series 8, as Amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent for the National Labor Relations Board, an original and four (4) copies of an Answer to said Amendment to Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Amendment to Amended Complaint shall be deemed to be admitted to be true and may be so found by the Board.

ORDER RESCHEDULING HEARING

The parties having mutually requested an extension of time for the holding of the Hearing previously scheduled herein,

IT IS HEREBY ORDERED, pursuant to Section 102.16 of the National Labor Relations Board's Rules and Regulations, Series 8, as Amended, that the date of the Hearing herein be, and the same hereby is rescheduled from 10:00 a.m. (MDT) March 30, 1976, to 10:00 a.m. (MDT), June 22, 1976, at

Room 260 New Custom House
721 - 19th Street
Denver, Colorado

Dated at Denver, Colorado this 25th day of March, 1976.

[SEAL]

/s/ Francis Sperandeo
FRANCIS SPERANDEO
Regional Director
National Labor Relations Board
Region 27
260 New Custom House
721 19th Street
Denver, Colorado 80202

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

Cases Nos. 27-CB-900
27-CC-571
27-CB-941

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA

and

AMAX COAL COMPANY, A DIVISION OF AMAX INC.

ANSWER TO ORDER CONSOLIDATING CASES, AMENDED COMPLAINT AND NOTICE OF HEARING AS AMENDED BY AMENDMENT TO AMENDED COMPLAINT AND ORDER RESCHEDULING HEARING

Now comes the United Mine Workers of America (hereinafter "UMWA" or "Union") and its Local 1854 and file this Answer to the Amended Consolidated Complaint which charges that they violated Section 8 of the Act.

I

(a) By letter dated January 9, 1975 (received January 14, 1975), the United Mine Workers of America received a copy of the original charge in Case No. 27-CB-900.

(b) By letter dated January 14, 1975 (received January 16, 1975), the UMWA received a copy of the first amended charge in Case No. 27-CB-900.

(c) By letter dated April 23, 1975, the UMWA received a copy of the second amended charge in Case No. 27-CB-900.

(d) By letter dated July 3, 1975, the UMWA received a copy of the third amended charge in Case No. 27-CB-900.

(e) By letter dated January 27, 1975 (received January 29, 1975), the UMWA received a copy of the original charge in Case No. 27-CC-571.

(f) By letter of July 3, 1975, the UMWA received a copy of the first amended charge in Case No. 27-CC-571.

(g) By letter of May 29, 1975, the UMWA received a copy of the charge in case No. 27-CB-941.

II

(a) The UMWA is without sufficient knowledge to affirm or deny the place of incorporation of Amax Coal Company, a division of Amax, Inc. (hereinafter "Amax"). Amax operates a coal mine known as the Belle Ayr Mine in an area around Gillette, Wyoming.

(b) Admitted.

(c) The UMWA is without sufficient knowledge to affirm or deny paragraph II(c).

(d) Denied. However, Amax, Peabody Coal Company, Energy Fuels Corporation, Kemmerer Coal Company, and Usibelli Coal Mine, Inc. have joined together in such an association. Big Horn Coal Company, Consolidation Coal Company, North American Coal Corporation, and Pittsburgh & Midway Coal Mining Company are not part of said association, having chosen to negotiate with Respondent individually. Respondent is unaware of a company doing business as Energy Coal Company.

(e) The UMWA is without sufficient knowledge to affirm or deny paragraph II(e).

III

Admitted.

IV

Arnold Miller has been President of the UMWA International Union since December 22, 1972; Duke Grant has been President of UMWA Local Union 1854 since

April 1975; Roy Casady has been Recording Secretary of UMWA Local Union No. 1854 since April 1975; James P. Marketti was an employee of the UMWA Organizing Department until July 1975; Billie L. Halbrook was President of UMWA Local Union No. 1854 until April 1975. The remaining allegations of paragraph IV, and specifically the allegations of agency, are denied.

V

The allegations of this paragraph are specifically denied.

VI

The allegations of this paragraph are specifically denied. It is particularly denied that either the representatives to the Joint Western Surface Mining Industry Training Committee which is established in Article XV, Section (a) of the UMWA contract proposal or the trustees of the Trust Funds established in the Health and Retirement Benefits provisions of the UMWA contract proposal, Article XVIII, are collective bargaining representatives within the meaning of the Act. Furthermore, the UMWA, Local 1854, and their members employed at the Belle Ayr Mine have been since 12:01 a.m., January 12, 1975, engaged in a legitimate economic strike against Amax at its Belle Ayr Mine. The strike is not for the purpose of forcing the Employer to engage in multi-employer bargaining, but is a result of the UMWA's long-standing tradition, and the requirement of its Constitution, that there shall be no work where there is no contract.

VII

Admitted. The UMWA further alleges that a unit composed of production and maintenance employees at the Belle Ayr Mine and at coal mines owned and operated by other Employers is likewise a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

VIII

In early 1972, a majority of the production and maintenance employees at the Belle Ayr Mine selected the UMWA as their collective bargaining agent. On March 27, 1972, the UMWA entered into a collective bargaining agreement with AMAX Coal Company for its Belle Ayr Mine.

IX

The UMWA admits that on November 22, 1974, an election was conducted by the NLRB at the Belle Ayr Mine, which the UMWA won by a vote of 45 to 3 and that thereafter, on December 9, 1974, the UMWA was certified as the exclusive bargaining representative for the employees at the Belle Ayr Mine. Though Local 1854 was named in the Representation Petition and Notice of Election, and thereafter in the Certificate of Representation as the exclusive collective bargaining agent of the employees, the UWMA, as the parent body of Local 1854, has been since March 1972, and remains today, through its Constitution, the bargaining agent of the employees at the Belle Ayr Mine.

X

The International Union, UMWA has at all times since March 27, 1972, been the collective bargaining agent for the employees at the Belle Ayr Mine.

XI

The allegations of this paragraph are denied. The UMWA requested AMAX to bargain in a multi-employer group by letter dated November 2, 1974. AMAX, by letter dated November 6, 1974, declined to accept the offer because of the existence of a question concerning representation at the Belle Ayr Mine. By letter dated November 23, 1974, Amax agreed to engage in multi-employer bargaining if its understanding of the UMWA's proposal was as stated therein and if the UMWA would accept the

terms enunciated therein by Amax. The UMWA, through its President Arnold Miller, accepted the Employer's offer to engage in multi-employer bargaining by execution of the November 23 letter, extended the collective bargaining agreement for another thirty days, and thereafter sought to engage in multi-employer bargaining with Amax. When Amax purported to withdraw from the multi-employer group after negotiations had commenced, the Union filed charges against it (Board Case No. 27-CA-4380). That case is now on appeal before the General Counsel of the NLRB.

XII

The Agreement entered into between the Union and Amax on March 27, 1972, was subject to termination upon sixty days' notice at 12:01 a.m., November 12, 1974. Though notice of termination was given to Amax on September 10, 1974, the Union unilaterally agreed to extend the Agreement until December 12, 1974. Thereafter, pursuant to its Letter Agreement with Amax dated November 23, 1974, wherein Amax agreed to multi-employer bargaining, the Union extended the Agreement at the Belle Ayr Mine at 12:01 a.m., January 12, 1975.

XIII

The allegation in this paragraph is admitted.

XIV

It is admitted that a strike commenced at the Belle Ayr Mine of Amax on or about 12:01 a.m., January 12, 1975. The remaining allegations of this paragraph are specifically denied.

XVI

The allegations of paragraph XVI are denied. At all times since mid-1974 and extending through the thirty-day period after notification of termination, the Federal

Mediation and Conciliation Service was fully advised that all UMWA Agreements in the soft coal industry and coal mine construction industry (excepting one Agreement negotiated and executed in the presence of the National Director of FMCS) would expire at 12:01 a.m., November 12, 1974. On September 11, 1974, the Union advised FMCS that it had given notice of termination of its various collective bargaining agreements (some 2,279 such agreements) covering 125,000 employees. On October 17, 1974, the National Director of FMCS was further advised by letter that the Union was continuing to negotiate with the signatories of those various agreements for a successor agreement, but that it had not yet reached agreement with such signatories. Both of these notices were sent within the period defined by Section 8(d)(3) of the Act. Furthermore, FMCS had actual knowledge within the thirty-day period of all the various coal mines, both bituminous and sub-bituminous, to which the UMWA had given notice of termination.

Moreover, the UMWA did more than comply with its statutory duty. By copy of its letter to FMCA dated September 11 and thereafter by letter dated October 17, 1974, the UMWA advised the Department of Labor of the State of Wyoming of the termination of its collective bargaining agreements within that State even though notice to the Department of Labor of the State of Wyoming was unnecessary and not required by the statute in that the State of Wyoming has no "agency established to mediate and conciliate dispute within that State" as required by Section 8(d)(3) of the Act.

XVII

The allegations of this paragraph are denied. The UMWA has since December 19, 1974, engaged in good faith collective bargaining with the multi-employer group of which Amax voluntarily became a member by its letter dated November 23, 1974. On February 23, 1975,

the UMWA entered into a collective bargaining agreement with the members of that multi-employer association. The Union and its Local 1854 further state that:

(a) The Union, its Local 1854, and its member employed at the Belle Ayr Mine has been since 12:01 a.m., January 12, 1975, engaged in a legitimate economic strike against Amax at its Belle Ayr Mine. The Union has not struck to force the Employer to engage in multi-employer bargaining, but has engaged in a strike because of its longstanding tradition and the requirement of its Constitution that where there is no contract, there shall be no work.

(b) Union representatives met with representatives of Amax on January 6 and 7, 1975. After Amax tendered a contract proposal different from the proposal advanced by the multi-employer group of which it became a member, no further meetings were held until February 3, 1975, after the UMWA had reached an impasse with the multi-employer association. The Union believed, at all times prior to February 3, 1975, and continues to believe to date, that Amax had become a member of the multi-employer bargaining association composed of Peabody Coal Company, Kemmerer Coal Company, Energy Fuels, Usibelli and itself.

(c) The Federal Mediation and Conciliation Service has received sufficient, actual notice from the Union regarding the termination of the Union's contract at the Belle Ayr Mine. Even though no notice was required to be sent to any State agency in the State of Wyoming for no such agency exists to mediate and conciliate labor disputes occurring within that State, the Department of Labor of the State of Wyoming was served with a copy of such notice.

(d) While Article I, Enabling Clause, was included in the original contract proposal submitted by the UMWA to Amax, in the form presented in paragraph XVII(d) of the Amended Complaint, the UMWA nego-

tiators consistently expressed a willingness to entertain counterproposals and in fact agreed to totally delete the so-called successorship clause. Moreover, the successorship clause does not violate Section 8(e) of the Act.

(e) While Article II, Section (g) was included in the original contract proposal submitted by the UMWA to Amax in the form presented in paragraph XVII(e) of the Amended Complaint, the UMWA negotiators consistently expressed a willingness to entertain counterproposals. Moreover, the clauses are not union signatory clauses but rather are lawful work preservation and job standards clauses.

(f) While the UMWA has bargained in good faith to obtain Article II, Section (a), Work Jurisdiction, in the form presented in paragraph XVII(f) of the Amended Complaint, the UMWA negotiators continuously expressed a willingness to entertain counterproposals. Moreover, the clause, even when read in conjunction with Article II, Section (g), does not constitute a violation of Section 8(e) of the Act.

(g) While the Coal Lands clause set forth in paragraph XVII(g) of the Amended Complaint comprised Article II, Section (f) of the contract proposal tendered to Amax by the UMWA, the UMWA subsequently agreed to Amax's proposal to delete the clause. Moreover, the coal lands clause is a lawful and mandatory subject of bargaining.

(h) While Article XV, Section (a) was included in the original contract proposal submitted to Amax by the UMWA, the UMWA has consistently expressed a willingness to entertain counterproposals and ultimately agreed to a training committee which would consist of one representative from Amax and one representative from the UMWA. Moreover, the clasue is a mandatory subject of bargaining. Finally, the representatives to the Joint Western Surface Mining Training Committee are not collective bargaining representatives within the meaning of the Act.

(i) Respondents have never conditioned the reaching of an agreement on a contract on Amax's withdrawal of all litigation including the unfair labor practices charged in the instant action or on any part of any litigation whether in the courts or before the Board.

(j) While the UMWA has strongly urged Amax to agree to its proposal regarding Health and Retirement Benefits, Article XVIII, the UMWA's negotiators have been open to the consideration of reasonable alternatives. Moreover, the trustees of the Trust Funds are not collective bargaining representatives whether the meaning of the Act. Amax has unilaterally instituted a pension plan at the Belle Ayr mine which was never discussed with the UMWA.

(k) The UMWA has not engaged in surface or bad faith bargaining at any time. It has always sought diligently to reach and execute a final and binding agreement with Amax and has made many concessions in order to reach that end. To the contrary, Amax has engaged in repeated footdragging including the withdrawal of Articles and clauses already agreed upon, the rejection of its own proposals once the UMWA adopts them, and the making of totally outlandish demands to erode historical employee rights.

XVIII

The allegations of this paragraph are specifically denied.

XIX

The allegations of this paragraph are legal conclusions and are specifically denied.

XX

The allegations of this paragraph are legal conclusions and are specifically denied.

XXI

The allegations of this paragraph are legal conclusions and are specifically denied.

XXII

The allegations of this paragraph are legal conclusions and are specifically denied.

XXIII

The allegations of this paragraph are legal conclusions and are specifically denied.

XXIV

The allegations of this paragraph are legal conclusions and are specifically denied.

XXV

The allegations of this paragraph are legal conclusions and are specifically denied.

WHEREFORE, the United Mine Workers of America, and its Local 1854, respectfully requests that the Amended Consolidated Complaint issued herein be dismissed in its entirety.

Respectfully submitted,

/s/ Ellen P. Chapnick
HARRISON COMBS
ELLEN P. CHAPNICK
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Answer to Order Consolidating Cases, Amended Complaint and Notice of Hearing As Amended by Amendment to Amended Complaint and Order Rescheduling Hearing were served by first-class mail, postage prepaid, this 2nd day of April 1976, upon:

Daniel F. Greunder
111 West Monroe
Phoenix, Arizona 85003

Terrence L. O'Brien
Omohundro & O'Brien
100 South Main Street
Buffalo, WY 84834

Amax Coal Company
P.O. Box 1890
Gillette, WY 82716

Amax Coal Company
105 South Meridian Street
Indianapolis, IN 46200

/s/ Ellen P. Chapnick

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

MR. FERGUSON: * * *

* * * * *

[47] Q Where is Amax Inc. incorporated?

A New York.

Q What is Amax Coal Company?

A Amax Coal Company is a division of Amax Inc.

Q Where is the principal office of Amax Coal Company?

A Indianapolis, Indiana.

Q What is the business of Amax Coal Company?

A We produce primarily a coal for the steam market.

JUDGE SHAPIRO: For the steel or steam?

THE WITNESS: Steam, electrical power generators.

[48] Q (By Mr. Ferguson) In what states do you operate?

A We mine coal in Indiana, Illinois, Kentucky, and Wyoming.

Q Are you familiar with a mine called the Belle Ayr Mine?

A Yes, I am.

Q Where is it located?

A In Wyoming, Cambell County, about 15 miles out of Gillette, Wyoming.

Q It is owned and operated by Amax?

A Yes, it is.

* * * * *

[53] Q When was that? When did the Belle Ayr Mine first come into operation?

A We shipped the first coal out of Belle Ayre in October of '73, I believe.

Q When did you first go about organizing the mine?

A Pardon me?

Q When did you go about first preparing the mine to begin shipping coal?

A We began early in '71 with the construction and the other activities necessary to get into mining operations.

Q I hand you a document marked General Counsel's Exhibit 4 in evidence, did you participate in the negotiation of that contract?

A No.

JUDGE SHAPIRO: Wait a minute, Joint Exhibit 4, Counsel.

[54] Q (By Mr. Ferguson) Excuse me, I am sorry, Joint Exhibit 4, is that the contract which was in existence until November, 1974, for the Belle Ayr Mine?

A Yes.

MR. GRUENDER: Until when?

THE WITNESS: Until when did you say?

Q (By Mr. Ferguson) I said November of '74. It was extended thereafter, was it not?

A Yes, it was.

* * * * *

[87] Q What did you tell the Union in regard to the pension and welfare trusts at the January 6th meeting?

A First, that we did not see how any of the Belle Ayr employees can benefit from the 1950 pension and benefit trust fund. Secondly, that we were being subject to a trust fund for which the trustees had been selected without any participation from us, and we also asked to see wome of the figures from the trust fund, because we weren't too thrilled with the way that it had been administered either.

Q What else did you state?

A In regard to that?

Q In regard to the pension and welfare trust?

A That's all I can recall at this time.

JUDGE SHAPIRO: Did you say anything about the trustees?

THE WITNESS: Yes, sir, I said they were selected without any participation from us on our part.

Q (By Mr. Ferguson) Did you make any statement as to who had selected those or why were you objecting that they were not selected by you?

[88] A Well, we said they had already been selected as part of the BCOA United Mine Worker negotiations for the bituminous industry. We felt that we should have our own trustees or joint trustees-type situation.

* * * * *

[90] Q Which proposal were you discussing in this meeting on January 7th?

A Well, we started by asking the Mine Workers to give us their response to the questions concerning the legal questions we had raised the night before. They advised that there would be a lawyer at the meeting, and they pointed out a gentleman by the name of Markettei, who represented himself to be a lawyer.

We wanted to talk about the legal points, we wanted to talk about the welfare and pension figures that we had asked about, and the ratification procedure, and that was the agreement that we had when we left the proceeding, cover three points and then get into a discussion of the Company's proposal.

Q Did you explain what legal points you wanted answered? Le me rephrase the question, did you specify the legal points about which you were inquiring?

A We had done that the previous evening.

Q What response was made by the Union at that time?

A Well, at that point in time, Marketti jumped up and asked what we thought we were doing there, and I explained to him that we were there to reach an agreement for our Belle Ayr employees, and he said, "No, you're here for informational purposes only. You are part of the Peabody Group, and you're to be governed by independently, why had they set out negotiation dates

negotiate as part of that group." I said, "Well, why didn't you tell us that last night?" He said, "Well, you took us by surprise when you handed us the proposals." We got into quite—

JUDGE SHAPIRO: No, please tell us to the best of your recollection what was said?

THE WITNESS: Well, I will do my best.

JUDGE SHAPIRO: You can delete any words that you feel are too harsh for this proceeding, but tell us what was said? I take it that Marketti was at the meeting before?

THE WITNESS: No, sir.

JUDGE SHAPIRO: He wasn't? Go ahead.

The WITNESS: Marketti was not at the meeting before, and he appeared at this meeting for the first time with his secretary, and we challenged the use of his secretary taking notes, and they said, well, they would be selective notes. We argued about that for a while, and finally agreed to proceed.

Marketti challenged our right to bargain independently with them, and he said that the Mine Workers did not have authority to bargain with Amax as an independent organization; that we had committed through a letter from our President, Hollie Hopper, to agree to join the Peabody, or the association to get into association [92] bargaining.

We asked him to show us the letter and he said, "Well, it is in Washington."

He advised us that the Mine Workers were requiring one contract covering fifteen different operations in the West; that they expected us to be a part of the Peabody negotiations, and that the meetings of the previous evening and this evening were informational in nature only. We challenged, we explained our visits to the Mine Workers, we explained the letters and telegrams, the whole thing that we had gone through previously. We questioned why if they didn't intend to bargain with us independently, why had they set out negotiations dates and why had they met with us the previous evening.

Anyway, with much back and forth along the same line, we got to a point where we were claiming we were there to bargain, and the Mine Workers said they were there to give us information. So, we caucused, we talked about it a while and came back out and said, "Look, you fellows claim you are here to give us information, and we are here to bargain. Without either side waiving its rights, let's go ahead and proceed and go through the Company's proposal, and you fellows tell us whether you are going to bargain with us." They said, "Well, we will not give you an answer on bargaining right now." [93] They restated their position and said, "We will let you know tomorrow whether we are going to bargain with you."

In fact, we went through the Company's proposal answering a number of questions that they had concerning our proposal as to why we had left certain things in the BCOA agreement and why we had changed the wording; in other words, attempted to explain our proposal.

One of the big questions involved the pension plan that we had proposed and which we had granted benefits equal to or better than we felt the Mine Workers had. There was some challenge why we did not accept the United Mine Workers pension plan. Once again, we told them, first of all, we wanted to negotiate the plan for the benefits, the contribution to support, we felt was our own business. We didn't like the Mine Workers plan because of the fact that we had nothing to say about the selection of trustees; that we were putting money in there to support a program our employees at Belle Ayr, at least part of the program, our employees at Belle Ayr never would participate in. We felt we could administer a pension plan as well as the United Mine Workers could.

We completed our discussions of our proposal, and then we asked the Mine Workers again, "Are you refusing to bargain with us?" "No, we are not refusing to [94] bargain with you," but, they again presented their position and it was agreed that I would contact Mike

Trbovich or he would contact me, I don't remember which, by 10:00 o'clock by the next morning to determine whether or not, in fact, the Mine Workers would, in fact, continue to bargain with us.

* * * * *

[109] Q Was the next meeting between the parties on March 14th?

A That's the next meeting I recall.

Q Did you submit a contract proposal to the Union at that time?

A Yes, we did—I did.

Q Where was this meeting held?

A In Washington, D.C., the office of the United Mine Workers.

Q What was the discussion regarding your proposal at that time?

A Well, we met with Mr. Dan Edelman and a fellow by the name of Jacobsen. Dan Gruender was with me.

JUDGE SHAPIRO: Jacobs or Jacobsen?

[110] THE WITNESS: Jacobsen; is that right?

MS. CHAPNICK: Yes.

THE WITNESS: Dan Gruender was with me. We made arrangements to meet with Mr. Edelman to review a proposal. We told him that the language in this proposal was language either which he had put on the table, the Mine Workers had put on the table, or the BCOA language, or language we had on the table for quite some time. It was our intent to break it down, present it to him, review the proposal, and answer any questions he might have.

We took the proposal in, went over it with Dan point by point.

JUDGE SHAPIRO: Dan?

THE WITNESS: Dan Edelman and Mr. Jacobsen point by point. The questions they had, we attempted to answer. We did give them a response.

We entered into some discussion after we had re-

viewed the proposal as to whether or not it was acceptable. Edelman said there are two things that would be necessary, at least two things: One was a common expiration date and the other was the United Mine Workers health and welfare fund. I asked him if we agreed on everything else except the expiration date, would he find the agreement satisfactory and acceptable.

Q (By Mr. Ferguson) What agreement?

[111] A Our proposal.

Q Thank you.

A Find our proposal acceptable. He said they would expect to hang out a long time just on the expiration date alone. I said, "Will you continue to strike even though we agree to everything except the expiration date?" He said, "Yes, we would not find that proposal acceptable," and we talked further about the health, welfare, pension fund. We explained again that our proposal was directed primarily towards benefits, not the funding of the trust.

He wanted to see our trust documents. We explained to him that we didn't have the trust documents developed because it was impossible to develop a trust document until we could reach some kind of agreement as to what the benefits would be and what the administrative regulations were going to be. It was our intent to do as well or better in terms of benefits for our employees that the Mine Workers welfare fund, and once we had got some agreement with regard to the basics for the than the Mine Workers welfare fund, and once we had

JUDGE SHAPIRO: This is what you told Mr. Edelman?

THE WITNESS: Yes.

JUDGE SHAPIRO: It is Edelman?

THE WITNESS: Yes.

We outlined to him that we were prepared to state there as long as necessary to review the language. He [112] allowed that that wasn't necessary, he would have to have some time.

We reminded him that we had previously had the agreement that our proposals would be a package deal, and a rejection of any part of them constituted a rejection of all of it, which he understood.

We asked him to then give us a response as to whether or not he found the proposal acceptable. He demurred, suggested that he would need some additional time.

Finally, he agreed that he would advise us by 5:00 o'clock, Washington time, on March 17th as to whether or not he found our proposal acceptable. I told him I would be in our Belle Ayr Mine in Gillette, Wyoming, would he please call me by 5:00 o'clock. He agreed, yes, he would.

Again, we told him that if you do not accept this, we will consider it your rejection. He said, "Well, that may not be necessary the way it is."

As we were leaving, Gruender, our attorney, said, "If you don't accept this, we will consider it, we will assume it is rejected." He said, "I don't care what you assume."

* * * * *

[114] Q (By Mr. Ferguson) Following this meeting on the 14th, did you subsequently contact the Union?

A Dan Edelman called me on the 17th.

Q What was that discussion?

A He requested more time to review our proposal. I explained that the language was the same that he had been looking at these three months. He said he would like to have more time to determine, to review the pro-proposal. I asked if they accepted it, and he said no. I asked him if he rejected it, and he said no. I said, "Well, if you don't accept it, we consider it a rejection."

Q As a result of this conversation, did you take any action after that?

A Yes. Following, I guess it was on the 20th, we [115] began to operate our mine with our supervisors, and on the 24th, we invited our employees to return to

work under our new proposal. We had advised the Mine Workers that we were implementing our final offer and we advised our employees that we were going to implement our final offer.

On March 29th, we opened the mine for our employees to return to work.

Q When did you advise the Mine Workers that you were going to implement your offer?

A Oh, I don't remember the exact date. It was shortly after our conversation with Mr. Edelman on the 17th.

Q And that offer that you were implementing was your offer of March 14th?

A Right, effective as of March 14th.

* * * * *

[148] Q I want to refer to your meeting in Washington with Mr. Edelman and Mr. Jacobsen on March 14th. Now, you handed them a proposal and subsequently in your testimony you started talking about this as a final proposal, my [149] question to you, Mr. Payne, is, at this meeting, did you tell Mr. Edelman it was a final proposal?

A Yes.

Q Are you sure?

A Yes.

Q Now, did Mr. Gruender at that meeting, if you can recall—

A Yes.

Q —tell the Union just generally what kind of pension proposals he was proposing with regard to the administrative end of it? Will you tell us about that?

A Mr. Gruender advised the Union that he was, we were prepared to make a pension proposal to the Union that was equal or better than the benefits of the Mine Workers pension plan. There was a question with regard to the trust documents. He advised the Union that we were not prepared to present to the Union the trust docu-

ments in which there had been no agreement as to what sort of administrative rules and regulations, et cetera. There had been no agreement on the plan. It would be impossible to develop a trust document until there had been some sort of agreement on a plan.

Q You generally told them what you offered in this regard?

A Yes.

[150] Q Will you please tell us about that?

A We were prepared to offer 10-year vesting, we were prepared to offer reciprocity with the United Mine Workers pension plan—I take that back, we were prepared to offer reciprocity with the Mine Workers plan, and the immediate vesting in the event reciprocity was not available. We discussed types of trustees, to the best of my recollection. Amax trustees or the possibility of joint trustees. We would track as close as possible administrative provisions of the Mine Workers plan. Our benefits would be equal or exceed those of the Mine Workers.

* * * * *

[183] JUDGE SHAPIRO: The BCOA, is this an employer group?

MR. BANKS: Yes.

JUDGE SHAPIRO: That negotiates for contracts covering a certain group?

MR. SULLEY: Bituminous coal.

JUDGE SHAPIRO: All right; in the Amax mines that are in particular—

MR. GRUENDER: In a different bargaining unit.

JUDGE SHAPIRO: That are in that bargaining unit covered by that; all right, fine.

Q (By Mr. Bank) How long has Amax been a member of the BCOA?

A About five years.

[184] JUDGE SHAPIRO: Will you indicate to me when you come to a break in the subject matter. I assume you still have extensive cross-examination?

MR. BANK: Yes.

JUDGE SHAPIRO: We will recess until tomorrow at that point. How much longer do you have on cross-examination?

MR. BANK: It is hard to tell.

JUDGE SHAPIRO: Well, when you come to a break-off point in the subject matter, we will recess until tomorrow. You should definitely finish this line though.

THE WITNESS: To the best of my recollection, we joined in 1971.

Q (By Mr. Bank) In 1971?

A Yes.

Q And you have been a signatory to the BCOA contract since that time?

A That's correct.

Q Do you know, Mr. Payne, how the trustees for the fund, which was proposed by the United Mine Workers of America, are chosen in the current negotiations for the Belle Ayr Mine?

A I am sorry, I don't understand the question.

Q Do you know how the trustee is chosen, the employer trustee is chosen, for the United Mine Workers health [185] and retirement fund?

A No, I don't specifically know.

Q Does it refresh you recollection if I say isn't it a fact that trustee is chosen on a basis of a vote by the employers which in turn is based on tonnage?

MR. GRUENDER: Objection.

JUDGE SHAPIRO: Overruled.

MR. GRUENDER: Contract provides for that in black and white.

THE WITNESS: I have never really known. I assumed that's what it is.

JUDGE SHAPIRO: This witness is obviously not competent, he has never had any recollection one way or the other on that.

* * * * *

[221] Q Did you attend a meeting with officials of the United Mine Workers and representatives of Amax Coal Company on [222] December 17, 1974, in Washington, D.C.?

A I did.

Q Who was present in that meeting?

A For the Union, Joseph Yablonski, identified as General Consel of the United Mine Workers of America; a Mr. Don Pierce, identified as a Research Assistant for the United Mine Workers of America; and a Mr. H. Elkins Payne, who is Vice President of Administration and Employee Relations of Amax Coal, a Division of Amax Inc.; Mr. John Cairns, Director of Industrial Relations for Amax Coal; and myself.

Q How long did this meeting last?

A To the best of my recollection, about two to two and a half hours.

Q Would you please tell the Court what was said in this meeting and would you please identify the persons speaking?

A Yes, sir. The meeting incidentally was held in the library of the United Mine Workers headquarters in Washington. The meeting was opened by Mr. Payne, when he stated that we were there to set up a procedure whereby Amax Coal could bargain on an individual basis for a new contract at its Belle Ayr Mine; that we wanted to establish appropriate times and places for such meetings, the result of which would be a new contract to replace the one that was to expire after the first of the year for the employees of our Belle Ayr Mine. Mr. Yablonski responded to that [223] statement, to the best of my recollection, by stating that he wondered what the Company's position was in respect to the so-called association.

We then went on to other matters, and these other matters encompassed a wide-ranging discussion of a variety of issues that would be in the bargaining process. These included such matters as the expiration date of a new contract, the coal lands clause, so-called, the health

and welfare trust funds and their applicability or non-applicability, and oh, a number of other matters that would be clearly a matter of bargaining.

I do remember some mention being made of out-contracting problems or subcontracting, as the phrase may be used. I seem to recall my making a statement that on the basis of general knowledge of subcontracting clauses elsewhere in effect with respect to the Mine Workers, that we might find it necessary to send some of our equipment as far away from Gillette as Denver, Colorado, in order to find an UMWA-organized shop.

I paid particular attention personally to the health and welfare funds, and stated that it was our objective to have a pension trust, the benefits of the pension plan would be guaranteed by the terms of the contract, the financing we hoped would be done as is customary, although not entirely the case, in other facilities of the Company whereby we pay [224] monies into a trustee bank, and they are administered and vested and managed by the trustee bank pursuant to a trust agreement with all the fiduciary responsibilities flowing therefrom, and that the benefits to our Belle Ayr employees would be guaranteed by the terms of the plan and backed up by the trust and the funds deposited therein.

There was some discussion of the so-called welfare items, that is to say, hospital, surgical, medical, and other coverages of that kind, and I indicated personally that we had many such plans in Amax, and generally, these were insured with a variety of insurance companies, again with the benefits being guaranteed by the terms of the contract, and the responsibility for providing what ever funding to support those benefits being provided by the Company.

It was a wide-ranging discussion of a variety of issues that would certainly occur in the course of negotiating a new agreement for the Belle Ayre Mine.

Toward the end of the meeting, Mr. Pierce asked for certain data to be provided in respect to the Belle Ayr employees, and of course, we agreed to provide that, such things as birth dates and ages and employment dates and the like; and as the meeting was breaking up, I got Mr. Yablonski's attention, and I said to him personally, "I want to make it absolutely clear that Amax Coal is bargaining separately and [225] individually for a contract for the employees at Belle Ayr, and I want it clearly understood that Amax is not bargaining for Peabody nor is Peabody bargaining for Amax."

Thereupon, the meeting was adjourned with an invitation from Mr. Yablonski that if we would like to say hello to the International President of the Union, Mr. Arnold Miller, he thought that he might be in his office and he could, in fact, arrange it, and this, in fact, happended. It was an informal and casual visit. We shook hands and said hello, and within five minutes were out of his office and on our way.

* * * * *

[278] Q Referring you to Article XX on health and welfare, was there any extended discussion on health and welfare in the meeting on the 7th?

A Yes, there was.

Q And was that more extended than had been entered into on the 6th?

A Oh yes, very much so.

Q And what was that discussion?

A Mr. Gruender handled the discussion for us. Mr. Gruender again explained to the Mine Workers, this was a different group of people who were there then, in detail why it was we were objecting to their insistence upon us accepting the trusts that had been negotiated by the BCOA. He explained in detail why it was that we did not feel bound to contribute [279] to the 1950 health and retirement and benefit trusts; and they got into some discussion about benefits, I believe, because we had our actuary there for the purpose of enabling us to do that.

I am not an attorney, but I do recall that Mr. Gruender laid out chapter and verse to Marketti what our objections to their proposal were and what it was we wanted and why it was we had the right to insist upon our making a separate proposal for the Belle Ayr Mine.

Q Was there any statement by Mr. Gruender in regard to the trustees of the proposed trust?

A Yes, there was.

Q What was that?

A Mr. Gruender told Jim Marketti and the rest of the people there in that room that we had the right, words to the effect that we had the right to select our own representatives for any health and retirement plan which was funded for the welfare employees; that the Mine Workers did not have the right to insist that we accept the representatives selected by other people, namely BCOA.

Q In this meeting on January 7th, was there any discussion between the parties in regard to the Employer's position that it was bargaining independently?

A Oh, yeah. There was a lot of discussion about that.

Q What was the Union's position?

[280] A The Union's position voiced by Jim Marketti was that we were only present for the purpose of giving and receiving information; that we were going to live with whatever it was that the Peabody group agreed upon with the Mine Workers, and we didn't necessarily have to like it, but that was the way the cows were going to eat the cabbage.

JUDGE SHAPIRO: That's the way the cows—

THE WITNESS: That's just my paraphrase. He told us in clear and unequivocal terms that we were going to have to live with what Peabody agreed with. We had no other rights but just to live with that.

Q (By Mr. Ferguson) Was this stated more than once?

A Oh yes.

* * * * *

[430] Q Let me simplify it and break it down, I am sorry. It is not your testimony, is it, that Danny Edelman's reservations about your proposal on health and welfare were limited solely to the fact that your proposal was not consistent with the provisions of the United Mine Workers health and retirement fund?

JUDGE SHAPIRO: One reason that Edelman gave for not [431] liking your proposal was that it was not similar to what?

MR. BANK: The United Mine Workers health and retirement.

JUDGE SHAPIRO: Is that true, that is one of the reasons Edelman gave, answer that yes or no? The reason he didn't like your proposal, it wasn't similar to that other plan, and he gave that as a reason?

THE WITNESS: He gave me that as a reason.

JUDGE SHAPIRO: Was that the only reason he gave, or did he give other reasons for not liking your proposal?

THE WITNESS: Yeah, I think I recall he gave another reason.

JUDGE SHAPIRO: Go ahead.

Q (By Mr. Bank) He didn't like the concept of a unitary trustee, did he?

A No, he didn't.

Q He did not like the fact that reciprocity was not guaranteed, did he?

A The reason I am hesitating, those were not the words that he used.

Q We are talking about concepts here.

MR. SULLEY: Objection, I am not talking about concepts, I want to hear what happened at these meetings.

JUDGE SHAPIRO: Overruled.

A (By the Witness) My best recollection is that he did [432] not like the idea of reciprocity.

• • • • •

[444] Q It has been testified to here before that Amax is a member of the BCOA, correct?

A That is true.

Q In fact, Amax is represented on BCOA's highest body, I am not sure whether it is called the executive committee or the executive council, by Mr. Sonnemann; is that correct?

A That's accurate.

Q And has been for how long?

A I don't know, I can't tell you, at least during the time I have been working for this Division, a year and a half.

* * * * *

[590] Q (By Ms. Chapnick) When negotiations began for a sub-bituminous and lignite agreement in the West, with which companies did the United Mine Workers commence bargaining independently?

A Consolidation Coal, North American, Coal Corporation involving its Indianhead Mine, Pittsburg & Midway Coal Company involving its Edna and McKinley Mine, two divisions of Peter Kiewit known as the Big Horn Coal Company and the other known as the Rosebud Coal Sales. Those were the companies that, I think that's all of them that we bargained with independently.

Q Prior to the beginning of negotiations for a [591] sub-bituminous and lignite agreement, was any action taken by the UMWA regarding the termination of the 1971 agreement covering those mines?

A All the companies that had been signatory to the 1971 sub-bituminous and lignite agreement received 60 days extension instead of their contracts expiring at 12:01 a.m., November 12th, and they would expire at 12:01 a.m., January 12, 1975.

* * * * *

[601] There was a large segment of the meeting which was consumed by discussions with Mr. Sonnemann respecting his background. If I am not mistaken, he had

joined Amax a year or so in advance of 1974 bargaining. He explained his background. He explained his participation in bituminous bargaining; that he had been on the steering committee; and he claimed during the course of that meeting a great deal of credit for the restructuring of the pension plan in accordance with ERISA, and otherwise indicating his responsibility for the progressive reforms that had been adopted in the 1974 Bituminous Coal Wage Agreement.

If I might, Mr. Sonnemann, it was my understanding at that meeting, told us that he was on the BCOA steering committee, or was something to that nature. It was a group that was basically in the back room. They were not present at the bargaining table. But, they were the biggest representative of the coal industry that reviewed and approved various movements that were made by the industry [602] in the course of those negotiations. I think it was called a steering committee. To a great extent, he amplified on the things that he had done in the course of that bargaining.

* * * * *

[623] Q With respect to Amax, what happened next?

A Sometime during the week of January 20th, I received a call from the Denver Region of the NLRB advising us that they anticipated issuing a Compaint against the UMWA based upon the Amax charges, and that they were simultaneously determining not to issue a Complaint based on the 8(a)(5) charges filed against Amax by the UMWA.

Q What did you do in response to this telephone call?

A I inquired about the possibility of settling, and whether the Board had abandoned its policy of attempting to seek a settlement prior to issuance of a Complaint.

It was right about this time, it was during this week that, I think, in discussions with Mr. Gillis, who is the Regional Attorney, indicated that the only settlement

the Board would accept would be a return to work by the men at Belle Ayr. I informed Mr. Gillis that I did not believe that we could settle on that basis.

We then had a discussion about whether or not the Union would agree to meet with Amax. I recall during the course of that week preparing a letter to the Denver Region, I think Mr. Gillis, with respect to the 8(d)(3) aspects of the, I believe it was the amended charge filed by Mr. Gruender.

[624] I had discussions in person with Mr. Nash, the General Counsel of the Board at that time. If I am not mistaken, I went over to the Board's offices in Washington. I think that Mr. Gruender had already been there or had discussed the matter with someone in the General Counsel's office, and as a matter of policy, they invited the opposing parties in. In any event, I did have discussions with Mr. Brisman and Mr. Nash. I believe that we had obtained the commitment of the Board that they would not seek injunctive relief.

I am not sure if it was at that time or at sometime later, in any event, I believe it was as a result of my discussions with Washington, which were thereafter relayed through the Denver Region, that Mr. Gillis sugguested that one way for use to avoid issuance of a Complaint—maybe the Complaint had been issued—avoid an injunction being issued against us would be to agree to bargaining independently with Amax. I discussed with Mr. Gillis at that time, Mr. Gillis kept using the words that we had to bargain with Amax for the Belle Ayr Mine only.

In the course of my discussions, I informed Mr. Gillis that the Mine Workers had had a provision in their agreement known as the coal lands clause for—

* * * * *

[626] Q (By Ms. Chapnick) Did Mr. Gillis tell you what his problem with the first telegram was?

A As I recall, he said that it did not clearly enough state that we would bargain independently with Amax for the Belle Ayr Mine.

JUDGE SHAPIRO: I must agree with Mr. Gillis. He was worried about the first part, about the impasse. All right.

MR. GRUENDER: We agreed with Mr. Gillis too.

JUDGE SHAPIRO: Mr. Gillis in the impression that I get, you weren't agreeing with the General Counsel's position, still this was an exception to the multiemployer group rule. Since you reached an impasse, you were privileged to bargain on an individual basis. He wanted more of a commitment; am I correct?

THE WITNESS: Well, he didn't express it exactly that way. He said he wanted the telegram to specify that we would bargain independently with Amax. I don't recall he said take out the language about impasse.

JUDGE SHAPIRO: But, the long and short of it is that the history of these telegrams is based on these conversations you had with the Board?

[627] THE WITNESS: Mr. Gillis was insisting that we send them.

* * * * *

[679] THE WITNESS: I recall Mr. Sonnemann taking exceptions, stating Amax had offered the UMWA a good benefit program in place of our health and retirement proposal. I recall, it might have been Mr. Payne saying that he did not understand why we were worried about anything other than what the employees might get, and I indicated we felt very strongly that the UMWA as the bargaining representative had a strong interest in the nature of whatever pension system should be developed, and the administration of that pension system.

I stated that we had never agreed to a pension system other than a 302(e)(5) type pension plan with tripartite administration and Union involvement in its administration; that in only one instance apart from the bituminous pension plan which had encompassed bitu-

and sub-bituminous [680] miners had the UMWA ever agreed to another 302(e)(5), that was the anthracite, and that the anthracite fund had come one very hard times and was nearly bankrupt and was very reluctant to enter into any agreement that did not provide the security of numbers that the multiemployer plan provided.

There was some discussion with respect to—just a second.

(Pause.)

I am quite certain that at that meeting, I indicated to the mediator—

JUDGE SHAPIRO: In the presence of the—

THE WITNESS: In the presence of Mr. Sonnemann and Mr. Payne that our position with respect to the pension proposal we had made with respect to Belle Ayr was eminently fair; that the agreement that had just concluded had provided for the payment of 20 cents per ton on each ton of coal mined at Belle Ayr; that at Belle Ayr, they were mining according to our figures 188 tons per man shift, or $36.70 a day in contributions which were made under the '71 contract; that our proposal that was on the table with Amax as of that meeting provided for the payment of 90 cents per hour, or $7.20 per day, a net savings to the company of $29.00 per employee.

Again, I think it was Mr. Payne that indicated that these were not things that should bother the UMWA, what the [681] costs were, what the administration was. We should only be interested in what the benefits were, and their last proposal was at that time just simply spelled out the benefits, and nothing else with respect to funding, structure, or administration, or anything of that nature.

I think probably the greatest part of the meeting was taken up discussing pension and economics.

* * * * *

[863] Q Is the United Mine Workers operating a retirment fund that is commonly known as a 302(c)(5) trust?

A Yes, it is.

Q Did you have any discussions with Mr. Cairns and Mr. Steinbeck on the relative merits approach on administration?

A Yes, we did. As I recall, it was initiated when I asked Mr. Cairns whether they were proposing a 302(c)(5) tripartite trust or an employer, administered plan and I think he indicated at that point that he really didn't know what the 302(c)(5) plan was, that's what he said. I explained and said that was the approach we favored and that the interest of the beneficiaries that the Union was representing would be better protected if there was a Union appointed trustee there along with the other trustees to look out for the interests of the beneficiaries.

Q In addition to the discussions which you had, were there any proposals exchanged?

A It was at this meeting that I tendered to Mr. Cairns a copy of the Western Surface Coal Wage Agreement and indicated that that embodied our proposal to Amax to consider as an amended proposal.

* * * * *

JOINT EXHIBIT 1(r)

W U

western union Mailgram

[Received Nov. 12, 1974, W.H. Hopper]

MGMINDT HS
2-012110E314 11/10/74
ICS IPMMTZZ CSP
2027372628 MGM TDMT WASHINGTON DC 100 11-10 040 6P EST ZIP

W HOLLIE HOPPER, PRESIDENT CARE AMAX COAL CO
105 SOUTH MERIDIAN ST
INDIANAPOLIS IN 46225

UMWA UNILATERALLY AGREES TO EXTEND CURRENT COLLECTIVE BARGAINING AGREEMENT COVERING YOUR BELLE AYR MINE TO 12:01 AM, DECEMBER 12, 1975.
ARNOLD MILLER PRESIDENT UNITED MINE WORKERS OF AMERICA 900 15 STREET NORTHWEST WASHINGTON DC 20005

16:06 EDT

MGMINDT HSB

To Mr. Samo
Date ——— Time ——

While You Were Out . . .

Message for Hopper

Mr Karin Fizer
Of
Phone 202-638-0530

☒ Telephoned

Message Mail-O-Gram from Arnold Miller "UMWA unilaterally agrees to extend current bargain agreement covering your Bell Ayr Mine to 12:01 AM Dec 12, 1974 not 1974 as gram reads

JOINT EXHIBIT 1(aa)

January 9, 1975

Mr. Joseph Yablonski
General Council
United Mine Workers of America
% Holiday Inn Downtown
Denver, Colorado

Dear Mr. Yablonski:

Your letter of January 8, 1975 disturbs me for several reasons. First, both you and your organization know that Amax Coal Company desired and intended to bargain independently from the outset. It was only after your organization threatened our organization with a work stoppage by our employees (the usually inevitable effect of your refusal to extend your agreement) that Amax Coal Company agreed to consider participation in group bargaining, but then only under certain conditions that were accepted by your organization.

One of the conditions was that bargaining commence in "late November." Your organization refused to permit bargaining to commence in late November and so you are responsible for that condition not being met.

Another was that if any agreement was reached, it would only cover our Belle Ayr Mine. By your organization's proposals and statements to us and other companies, you have made it clear your organization plans to extend the agreement to all sub-bituminous mines a company may now have as well as those that develop in the future. This is contrary to our agreement and is another condition that is not met.

Another condition was that we did not prejudice our rights to bargain independently at any time in the future if we were unable to agree upon or make suitable arrangements with the designated industry representative as to how or what they would do to represent our company.

We pointed out to you we did not expect the other company to enthusiastically represent our company interest in these negotiations. We believed it might not even be in their best interest to do so. We feared significant conflict of interest might arise that could prevent the other company from fairly representing our company and our employees' interest in bargaining.

Those conflicts have now surfaced and apart from anything else that is happening or has happened, we believe you organization's efforts to refuse to bargain with us and to belatedly attempt to force us into being represented by an organization or group with whom it is now apparent (particularly with respect to your health and welfare pension proposals) that we have a clear conflict of interest. We think that is also unlawful.

It is also our belief that your organization's efforts to force us to accept what the industry representative may agree to will force us to do something which it would be unlawful for you to insist we do if you were to demand the same for Amax Coal Company directly. We believe that is evidence of bad faith and unlawful.

What you say in your letter about our December 17, 1974 meeting is not true. On December 17 and before, we clearly stated to you our intent to not engage in joint bargaining and to bargain for ourselves.

We wanted to bargain with you for our employees and to reach an agreement. We are confident we can. We urge you to stop making unlawful efforts to avoid your obligation to bargain and discuss with us the terms of a new agreement for our employees, yours and our mutual benefit.

We continue to be available to meet with your organization. Please call to arrange suitable meeting times.

Sincerely,

H.E. Payne, Jr.

JOINT EXHIBIT 1(gg)

AMAX CO IND
642P EST JAN 30
WUH059
IDB211(1004)(1-031653C030)PD 01/30/75 1645
TWX UMWA WASH
001 WASH DC 1 30 75
PMS MR. H. ELKINS PAYNE
AMAX COAL COMPANY
105 MERIDIAN
INDIANAPOLIS, INDIANA

DEAR MR. PAYNE:

THIS TELEGRAM SUPERCEDES OUR TELEGRAMS DATED JANUARY 24 AND JANUARY 29, 1975, PREVIOUSLY SENT TO AMAX. THIS IS TO MAKE CLEAR THAT WE OFFER UNEQUIVOCALLY TO BARGAIN WITH AMAX INDIVIDUALLY CONCERNING THE CERTIFIED UNIT OF AMAX EMPLOYEES AT ITS BELLE AYR MINE. WE ARE PREPARED TO MEET WITH YOU TO BARGAIN ON THIS BASIS ON MONDAY, FEBRUARY 3, 1975, IN DENVER, COLORADO. WE DO INTEND TO APPEAL THE REGIONAL DIRECTOR'S DISMISSAL OF OUR SECTION 8(A)(B) UNFAIR LABOR PRACTICE CHARGE IN CASE NO. 27-CA-4380.

JOSEPH A. YABLONSKI
GENERAL COUNSEL

NNNN

JOINT EXHIBIT 1(kk)

W U

western union Mailgram

MGMPHXC PHX
2-043755E076002 03/17/75
ICS IPMRNCZ CSP
1 6022575513 MGM TDRN PHOENIX AZ 03-17-75
ZIP 85003

SHIMMEL HILL BISHOP AND GRUENDER
111 WEST MONROE
PHOENIX AZ 85003

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

6022575513 TDRN PHOENIX AZ 93 03-17 0603P EST
PMS JOSEPH YABLONSKI, UNITED MINE WORKERS OF AMERICA, DLR
900 15 ST NORTHWEST
WASHINGTON DC 20005

OUR CLIENT AMAX COAL COMPANY ADVISES THAT THE UMWA REPRESENTATIVE HAS NOTIFIED THEM THAT THE COMPANIES MARCH 14 1975 FINAL PROPOSAL IS NOT ACCEPTABLE AND THEREFORE UNDER THE PROCEDURES RE PACKAGE PROPOSALS SET BY THE PARTIES IS REJECTED SINCE THE UMWA AND OUR CLIENT ARE AT LOGGERHEADS ON SO MANY ISSUES INCLUDING THE TERMINATION DATE, IT APPEARS THAT THERE IS AN IMPASS. IN VIEW OF THAT, OUR CLIENT HAS DECIDED TO PUT ITS FINAL OFFER, AS REJECTED BY YOU, INTO EFFECT

EFFECTIVE MARCH 14 1975 AS PROPOSED IN THEIR FINAL OFFER
DANIEL F. GRUENDER COUNSEL FOR AMAX COAL CO

1849 EST

MGMPHXC PHX

JOINT EXHIBIT 1(mm)

[Apr. 11. 1975]

W U

western union Mailgram

MGMPHXT HSB
2-043741E100002 04/10/75
ICS IPMRNCZ CSP
1 6022575513 MGM TDRN PHOENIX AZ 04-10 0647 P EST
ZIP 85003

Op. 149; Sent 4:35 4/10/75; TMB
cc: Elkins Payne

SHIMMEL HILL BISHOP AND GRUNDER TMB
111 WEST MONROE
PHOENIX AZ 85003

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

6022575513 TDRN PHOENIX AZ 257 04-10 0647P EST
PMS JOSEPH A. YABLONSKI, UNITED MINE WORKERS, DLR
900 15 ST
WASHINGTON DC 20005

RE YOUR TELEGRAM OF MARCH 18 TO ME ON AMAX COAL COMPANY BARGAINING. EDELMAN AND YOU IN ERROR AFTER ATTEMPT AT FURTHER STALLING EDELMAN REJECTED AMAX'S FINAL OFFER ON MARCH 17. UMW'S CLAIMED GOOD FAITH CONSIDERATION OF SUCH OFFER IS RIDICULOUS IN VIEW OF UMW'S REFUSAL TO EVEN SINCERELY BARGAIN WITH

AMAX ON INDIVIDUAL BASIS, GOOD FAITH BARGAINING DOES NOT REQUIRE MARATHON ENDLESS AND FRUITLESS DISCUSSION. THERE COMES A TIME WHEN IT IS PROPER TO EXPECT SOME DECISION BE MADE, YOUR ORGANIZATION HAD OUR CLIENTS PROPOSAL FOR BETTER THAN A WEEK BEFORE YOU SENT YOUR TELEGRAM AND IN THE TELEGRAM YOU STILL ARE CLAIMING YOU WERE CONSIDERING IT. UMW'S HISTORIC INFLEXIBLE AND INTRANSIGENT INSISTENCE ON SO CALLED INDUSTRY AGREEMENT WITHOUT VARIATION EXPOSES UMW'S ALLEGED "CONSIDERATION" AS SHAM. OUR CLIENT CAN'T UNDERSTAND WHY YOU ARE CLAIMING THERE IS ANYTHING WRONG WITH ITS PUTTING ITS FINAL PROPOSAL WHICH YOU REJECTED INTO EFFECT, AFTER ALL YOU HAD OUR CLIENTS EMPLOYEES "RATIFY" A CONTRACT THAT DOES NOT EVEN APPLY TO OR COVER THEM EVEN BEFORE YOU HAD REACHED ANY UNDERSTANDING WITH OUR CLIENT IF YOU WERE SINCERE ABOUT BARGAINING IN GOOD FAITH INSTEAD OF GIVING LIP SERVICE TO YOUR DUTY BY BARGAINING BY ACCUSATION YOU COULD TAKE YOUR TONGUES OUT OF YOUR CHEEKS AND PUT YOUR MONEY WHERE YOUR MOUTH IS AND BY ACTION CONFIRM WHAT YOU CLAIM YOU HAVEN'T HAD TIME TO DO YET; NAMELY, NOTIFY OUR CLIENT WHETHER YOU ARE NOW WILLING TO ACCEPT ITS FINAL OFFER IN ACCORDANCE WITH THE RULES YOU SET DOWN WHEN MEETINGS BEGAN.

DANIEL F GRUNDER
COUNSEL FOR AMAX COAL CO

18:48 EST

MGMPHXT HSB

JOINT EXHIBIT 1(nn)

WU

PFA 203(1627)(1-035713CIU)PD 04/11/75 1625

WESTERN UNION Telegram
TWX UMWA WASH
001 WASH DC 4 11 75
PMS MR. DANIEL F. GRUENDER
111 WEST MONROE ST
PHOENIX, ARIZONA 85003

THIS IS IN ANSWER TO YOUR TELEGRAM TO ME OF APRIL 10. UMWA REJECTS AMAX LAST OFFER. UMWA'S LAST OFFER STANDS WITH THE FOLLOWING EXCEPTIONS: IMMEDIATE REINSTATEMENT OF ALL EMPLOYEES; INCREASE OF CATCH-UP ALLOWANCE TO $500; DISMISSAL OF ALL LITIGATION.

JOSEPH A. YABLONSKI
NNNN

JOINT EXHIBIT 1(ggg)

UNITED MINE WORKERS OF AMERICA

[SEAL]

UNITED MINE WORKERS' BUILDING
400 Fifteenth Street, N.W.
Washington, D.C. 20005

March 4, 1976

Mr. John S. Cairns, Director
Industrial Relations
AMAX Coal Company
105 South Meridian Street
Indianapolis, Indiana 46225

Dear Mr. Cairns:

The enclosed letter from UMWA Trustee Harry Huge on the subject of reciprocity between the single mine pension plan at Belle Ayr and the United Mine Workers of America Health and Retirement Funds is self-explanatory.

Since he speaks for the other two trustees, any further consideration of reciprocity, especially in view of the BCOA's views on this matter, would be futile. Accordingly, in light of the UMWA's strongly held views on the advantages of portability for Belle Ayr employees, we reject your current pension and health proposals. This is not to say that we have no quarrel with other aspects of your plans, because we have many, and have expressed them many times. It is only to say that the impossibility

of reciprocity makes any discussions here of our reservations unnecessary.

Very truly yours,

/s/ Mike Trbovich
MIKE TRBOVICH
Vice President

Enclosure

CC: Rick Bank
Rich Trumka
Mick Halamandaris
Bill Hurtado
Frank Stevenson
Dell Brownfield

UNITED MINE WORKERS OF AMERICA
HEALTH AND RETIREMENT FUNDS
2940 K Street, Northwest
Washington, D.C.

February 23, 1976

Mr. Richard M. Bank
Executive Assistant
to President Miller
United Mine Workers of America
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Bank:

This is in response to your verbal request as to whether the Trustees of the United Mine Workers Health & Retirement Funds would consider granting reciprocity for pension credit for participants of another plan.

I have had an opportunity to discuss this with the other two Trustees of the UMWA Health & Retirement Funds, and we all three are in agreement that we could not alter the Plan to grant recoprocity for pension credit as you have outlined to us. There would have to be an amendment to the Plans in order for the agreement as outlined to us to be instituted. Such an amendment, of course, can only be done by the settlors of the Funds.

Cordially

/s/ Harry Huge
HARRY HUGE

cc: C.W. Davis, Trustee
Paul Dean, Trustee

JOINT EXHIBIT 1(kkk)

AMAX COAL COMPANY

105 South Meridian Street, Indianapolis, Indiana 46225
[317] 266-2626

June 9, 1976

Mr. Arnold Miller, President
Mr. Mike Trbovich, Vice President
Mr. Harry Patrick, Secretary-Treasurer
UNITED MINE WORKERS OF AMERICA
United Mine Workers Building
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Gentlemen:

Your letter of March 15, 1976, to Hollie Hopper, has been referred to me for response.

You stated your purpose in writing the letter was to make it clear that the failure to reach agreement at Belle Ayr was the fault of the company negotiators, not the union's and the company negotiators did not want an agreement. In an effort to set the record straight and provide you with the response Mr. Hopper promised in his letter of March 23, 1976 and without going into all of the bargaining history, the following general points are offered.

Amax has always sought to take whatever reasonable steps were necessary and appropriate to reach agreement with UMWA at Belle Ayr consistent with the law. We have resisted ambiguous language or unlawful clauses or those that didn't accommodate to the needs of the Belle Ayr Mine. However, we have made concessions in order to accommodate UMWA's wishes even though we felt it was probably misleading to employees. For example, notwithstanding that Wyoming is a right-to-work state and no company can enter into a union security agreement

with the union and still comply with the law, we agreed to insert UMWA demanded language which will mislead employees into believing that they have to join the union in order to continue working. For most employees who do not know the law, including a phrase "to the extent required by law" does not inform them of anything or cancel out the effect of the other language that clearly requires them to join the union.

We do not know what you believe an "optimum" contract includes but its been our experience that few parties to any negotiations get everything they want. Our proposals also hardly can be described as a "sweetheart" contract, particularly when they meet your wage demands and contain many language concessions and benefits such as pensions that exceed your proposals.

Your description of the course of bargaining is inaccurate because aside from reciting things that did not happen, it also omits that which did happen.

We came to the bargaining table in the latter days of 1974 and the first week in January, 1975 and have tried to compromise and reach agreement. After a formal exchange ofproposals on January 6th, and after discussing the terms and the reasons for the proposals and language, we were then faced with uniform intransigence, insulting conduct and treatment and refusals to meet by representatives of the Mine Workers. We were forced to go to the extent of filing an unfair labor practice charge and even then the UMWA would not meet with us until the National Labor Relations Board representatives threatened to seek a 10(j) injunction unless the UMWA agreed to do so in late January and the early part of February, 1975. Prior to that your organization broke off negotiations with us and called an untimely and unlawful strike which continues to this very day. Also, from the outset of negotiations we have been confronted with no less than five separate bargaining teams from your organization which has required that with each team our bargaining started all over. A good case in point is

that by the time your last bargaining team came on the scene in late 1975, the National Labor Relations Board had long since issued a complaint against the Mine Workers for its bad faith bargaining.

Our problems with UMWA commenced when your negotiators started insisting that we were bound to abide by whatever other industry negotiators agreed to and we note that your organization is still maintaining that position and has not relinquished it.

After trying futilely to work out some agreement with the UMWA in February, this company made a final proposal on March 14, 1975 and arranged a meeting with UMWA representatives in Washington to explain it. Our representatives asked for a prompt response and were assured that they could get one at the close of business the following Monday. They were reminded that the original ground rules, agreed to by the parties, were that proposals were to be "package" proposals and, if they were not all accepted then they were all considered rejected. On the following Monday our company was informed that the proposal was not going to be accepted. In view of the rejection of that proposal, a rejection which was again confirmed later, Amax thereafter put that final proposal into effect. At about the same time the United Mine Workers of America embarked upon a course of, what we consider to be improper activities, including a massive propaganda barrage, by-passing of our designated bargaining representatives, continuing insistence on non-mandatory and unlawful clauses, insistence that we give up rights to designate who our representatives will be for bargaining about the all-important terms and conditions of employment such as pensions, health insurance and training, filing unsupported charges with the U.S. Attorney, threatening and engaging in unilateral action and work stoppages in the mid-west, attempting to blackmail Amax by offering to not file charges alleging improprieties with the F.T.C. Commission nor the I.C.C. Commission if Amax would agree to

UMWA's demands, engaged in efforts to disrupt stockholder meetings, picketing the headquarters of Amax Coal Company in Indianapolis, attempting to implicate company representatives in contrived and false claims of improper payments to union representatives and raising constant threats of waging a "Duke Power" campaign against Amax.

The UMWA's position on contract terms, was virtually unchanged from December of 1974 to late June or July, 1975. At that time, under pressure from unfair labor practice charges and complaints issued by the National Labor Relations Board, the UMWA made some minor concessions; all the while conducting your massive propaganda barrage in efforts to bypass company negotiators by making direct appeals to the Board of Directors and even threatening to picket them individually. Accompanying the new proposal was a letter of explanation which was inconsistent with the proposal. In exploring the differences in Washington with Mr. Yablonski, he then advised to disregard the letter of explanation.

In the July meeting in Washington, before the Federal Mediator, with UMWA's representative, Yablonski, Amax's negotiators again went over proposals made by the UMWA giving their opinions and views on contractual issues on which the parties were at odds. Additional meetings, including detailed discussions, were conducted with Mr. Yablonski, UMWA's then sole negotiator, in Louisville. Thereafter, Mr. Yablonski left the United Mine Workers. Apparently it was known to you that he was leaving before he was sent to bargain with Amax in July and August of 1975.

Thereafter UMWA sought no additional meetings even though we had made various proposals to your representative on which we were to receive a response.

Meanwhile, the Mine Workers continued their efforts to harass the company by supporting false rumors in the press about Amax and its operations, threatening to create trouble in their foreign holdings and alleging im-

proprieties by company representatives without support in the facts or without ever backing up such inaccurate claims.

Thereafter UMWA again switched negotiators on the company and starting on October 9, 1975, the company once again was compelled to go over and recount all past negotiations for approximately the fifth time. On top of this, UMWA's negotiators claimed to have a lack of knowledge of past discussions and detailed objections to UMWA's proposals which were given in detail in December, 1974, January, February, July and August of 1975.

You noted that complete packages of proposals were exchanged several times without much progress. We received the union's original proposal and thereafter until July 1, 1975, the UMWA would not change their proposals except where the Peabody group had come to agreement on a particular provision. Amax did submit package proposals at the early stages but were never able to get meaningful response from the UMWA negotiations except they were disregarded or UMWA claimed that Amax was bound by what the Peabody group negotiated. In subsequent meetings in ensuing months, Amax made other proposals. After the Amax final proposal was put into effect, Amax made specific oral proposals, particularly in the July and August meetings. Some of them are also in writing.

In October, 1975, as previously stated, Amax, at the request of UMWA, began all over again and reviewed past negotiations for your new negotiating team, including our objections to many of the proposals previously rejected by UMWA. Thereafter on or about November 14, 1975, UMWA sent another counter-proposal to Amax. This proposal was again accompanied by a letter of explanation, which, in some areas was ambiguous when contrasted with the proposals, and in other areas, was not consistent with the proposals. The November 14,

1975 proposal by the UMWA still retained a number of the illegal provisions which Amax had repeatedly informed UMWA negotiating teams it could not concede.

Further explanations of the parties' positions were made in Washington, D.C. in November, 1975.

At Salt Lake in December, 1975, we again met and as previously discussed with UMWA representatives, brought in a number of counter-proposals which, in some instances, we felt we would rather not make; for example, in the sub-contracting area, but which we felt would provide common ground for some agreement or compromise. At that time we informed you that we did not intend to give up or waive our legal rights and objections to your or our proposals on these issues simply because we were willing to bargain about possible areas of agreement. It may not have been necessary to have stated this since everybody understood that all proposals were made as package proposals and that either the entire proposal was accepted or none of it was considered accepted. The parties always recognized each others rights to change proposals or submit new ones when prompted by legitimate economic reasons and not with an unlawful purpose as bargaining progressed.

When we met in Salt Lake we presented our proposals on December 7th. On the morning of December 8th, before we had completed submitting all of our proposals, your negotiators indicated that they did not want to respond to our proposals but wanted to take our proposals home with them to study them first. Your negotiators, at that time, informed our bargaining committee that you had some other pressing business.

We are surprised that it is the feeling of your negotiators that we made no attempt to meet their needs. We are also surprised that they felt that they had attempted to meet ours. We felt exactly the opposite. For example, after we explained the importance to the company of trying to obtain some kind of relief on the seven day work restrictions in the agreement in Salt Lake, we felt that

your negotiators were sympathetic to our problems and willing to work out some kind of a solution. In Chicago in February, your negotiators flatly told us that they did not believe we had any justification for our request for some relief on those restrictions and they would not do anything unless we documented all of our needs in writing. This dashed our hops and once again it became apparent to us that UMWA was not going to respond in kind to our conciliatory advances.

In our February 1979 meeting UMWA's representatives rejected the counter-proposals which we had made, in an effort to accommodate to their claimed needs and agreed only to a few technical minor matters which had been pending for many months.

The February, 1976 meetings in Chicago were arranged, in part, to permit your negotiators to respond to the proposals we made in Salt Lake in December. The delay was in part caused by the filing of a petition by a majority of employees at the Belle Ayr Mine, who had joined a new union called NEW ACME, who, in turn, claimed and presented evidence to the company that they represented an overwhelming majority of the employees. A petition for election was filed with the NLRB in Case No. 27-RC-5198 at or about the time we were meeting in Salt Lake. Thereafter, that petition was administratively dismissed by the Denver Region allegedly because of the fact that there was a meritorious refusal to bargain charge pending against the United Mine Workers and one against the company that had been dismissed by the Region.

Notwithstanding that petition and presentation to us of a majority interest in another union, we bent over backwards and arranged to meet with you on February 17th and 18th in Chicago.

Our hopes were dashed when you commenced those meetings by telling us that your review of our proposals showed that there had been no movement at all. A long time prior to the February 17, 1976 meetings, on numer-

ous occasions, Amax had made considerable movement and considerable concessions. We had reiterated and re-explained to various UMWA negotiating teams, for example, that we did not wish to waive our legal objections to extra-unit and pre-hire problems contained in your Enabling Clause. In the February 18th meeting UMWA finally agreed to sign off four items which had been pending for a considerable period of time but basically you stuck by your November 14, 1975 proposal. At the February, 1976 session you finally agreed to sign off on the language we proposed to eliminate the ambiguity in the clothing allowance language, signed off on the safety language which included *our* inclusion of the word "hard hats" and our concession to agree to "ear plugs" rather than "ear protection" and you signed off on Article III (C) (4) and (5). In addition a language clarification to avoid pyramiding of overtime on holidays occurring during vacation periods was signed off, as well as your concession not to require our training program to be controlled by the Peabody group "Joint Training Committee."

Our proposal on the Enabling Clause, from the outset, has included some management rights language, language proposed in an effort to avoid the extra bargaining unit and pre-hire problems, omission of your all inclusive language contained in that clause regarding union recognition. We have never gone along with your idea that we can be compelled to bargain about what the scope of the bargain unit is going to be, particularly in view of the Board certification. We believe that is something for the Labor Board to determine and we further believe that new units and their employees should be free to make their own choice of bargaining representatives and engage in collective bargaining as they see fit without being foreclosed by the company with representatives they did not select.

In your letter you remark that in inserting the union's security language we merely reinserted a clause which

had been in every previous Amax contract with the United Mine Workers both in the east and the west. You should bear in mind that Amax, itself, has never, prior to the current Belle Ayr negotiations, had an opportunity to "negotiate" individually an agreement with United Mine Workers. They have been bound by the BCOA negotiated Association Agreement for the bituminous coal operations in the east and Amax's separate sub-bituminous contract with UMWA was simply executed in 1972 without any negotiations whatsoever and merely signed up since it was in the middle of a contract term, fully expecting to have an opportunity to negotiate a contract to meet the needs of the west, after the mine was operating. The UMWA representatives knew that the sub-contracting clause was not being observed for various reasons; at the outset there were insufficient ABC contractors about and there was a shortage of skilled labor in the Gillette area. As a result the union knew that much of the maintenance and construction work was being done by contractors and suppliers who had no relationships with the UMWA. That fact was stated to the union at the outset of the Denver negotiations and all of a sudden, almost a year later, the UMWA claims some ulterior motive on our part in wishing to continue the practice that has existed with respect to sub-contracting since that mine opened.

You repeatedly assert that the UMWA has given up a great deal and received nothing in return. We cannot agree with that statement, particularly that you have received nothing in return. Belle Ayr employees are receiving as much as employees are receiving in any other mine represented by your union and in some cases, more. While you state that you have very little left to give, we urge you to yield on the unlawful demands you are still maintaining that we must concede; for example, we can see no reason for you to continue to insist that the certified local not be mentioned in the agreement or permitted to sign the agreement.

In your letter you refer to contract provisions that you have dropped. It is not accurate to state that these clauses were contained in UMWA contracts with "Amax" for years since those agreements were not negotiated by Amax but by the BCOA, a separate group not controlled by Amax, unless you were referring to the separate predecessor agreement at Belle Ayr where Amax simply executed a separate agreement even before a representative complement of employees were hired and waived at that time the opportunity to "negotiate" until 1974, as discussed earlier.

Since you seem to claim you have made important concessions by dropping clauses, perhaps other comments are in order.

The Successorship Clause which you demanded and to which we objected and still object to on the grounds of its unlawful effect, and the fact that we could not be compelled to so bind our hands or options on future transactions, was insisted upon by the UMWA until November 14th. Notwithstanding the fact that you claim to have yielded on the Successorship Clause, you still insist on almost the same type of restrictions in other clauses.

It is true with respect to some of these clauses that Amax, when faced with your threatened unlawful and untimely strike, made an effort to compromise or agree. However, Amax stated it had legal objections and your unlawful strike didn't make our objections to those clauses disappear. We continued to assert them. We made another effort in March, 1975, and that offer fell on deaf ears and was not accepted by the agreed upon time and was rejected. UMWA thereafter did not even claim to relinquish its insistence on that unlawful successorship clause despite our repeated objections, until confronted with a National Labor Relations Board complaint attacking it. In view of this, we are not persuaded that your action in complying with the law should be considered to rise to the level of a "concession" in our negotiations.

In your letter you "claim" that UMWA dropped its unlawful proposals regarding private leasing, sub-leasing and licensing out coal lands. However, the language you still insist on is still improper and unlawful.

You claim that you withdrew the retroactivity allowance which you claimed was a cash benefit to employees to compensate them for the rising cost of living. However, you insisted we pay a higher retroactivity allowance and informed us that it had to do, in part, with the vacation and Christmas bonus which our employees had earlier received; in February your negotiators refused to provide us with any supporting facts as to the justification for retroactivity; and, in addition to that, on March 24th our employees all received a retroactivity allowance agreed to by the Peabody group and your subsequent demands on this point would have required us to pay that same sum all over again. We are having a difficult time understanding how your withdrawing of a proposal that we pay employees double, is an important "concession. It smacks more of simply the elimination of a "strawman" proposal.

You claim that you made a substantial concession on November 14th in withdrawing manning requirements for surface mining equipment except on over-burden drills. An examination of your November 14th proposal discloses that it is true that you claimed to have withdrawn that proposal; however, Article XIX contains the very manning requirements you claim to have withdrawn. The original proposal regarding manning of certain mining equipment is contained in Article XIX of the Peabody Agreement. Your November 14th proposal doesn't change it in any material respect that we can ascertain. Taking something away with one hand and giving it back with the other hardly constitutes a concession, particularly since the proposal doesn't result in any actual change in position.

You claim a major concession in withdrawing the severability clause, which in effect provided for a reopener

of everything in the event one particular provision of the agreement was conscidered or declared invalid. We are appreciative of that concession but Amax never made it a major hangup point with the Mine Workers.

You further contend that you withdrew the requirements that the Mine, Health and Safety Committee have input in the development of mining plans. We never took the position that the Mine, Health and Safety Committee should not have "input" in the development of mining plans. Our position simply was that the decisions as to what to mine and when was basically a responsibility of management and that we would discuss anything employees wanted at any time that related to safety and further that we did not want our mining plans a matter of public record; that the grievance procedure was always available to handle any problem that might arise as a result of a mining plan and certainly any safety problem in connection therewith. Input in the development of mining plans, insofar as it would have involved safety, particularly, was always assured by our agreement to Article III (C) (6) of the original UMWA proposal.

You further claim a substantial concession by your November withdrawal of what you characterize as traditional Amax-UMWA language extending contract jurisdiction to all mines of the employer. In the first place, while you did withdraw language which you had proposed, that broadly extended the contract jurisdiction to all mines including non-existent mines or future mines of the employer, the language that you retained still reserves to UMWA such rights. Furthermore, it is inaccurate to refer to that language as "traditional Amax-UMWA language" because apart from the temporary and probably at the time, illegal signing of the 1972 Belle Ayr Agreement, Amax never "negotiated" such language with the UMWA. Such language, which you call traditional, has occurred only in the BCOA Agreements which were not negotiated by Amax. The same is true about your claims that the Coal Lands Clause District Agree-

ments and Sub-Contracting Clauses are "traditional Amax-UMWA" contractual provisions.

In view of the fact that Amax never before had an opportunity to sit down and bargain with the UMWA as an individual company concerning some of this contractual language (much of which the parties themselves find ambiguous and don't understand) which had been inherited down through the years from the BCOA, we fail to see why you were unwilling to listen to our views on these clauses, particularly where the clauses you were insisting on were unlawful. For example, your language extending contract jurisdiction to all mines of an employer is unlawful. The Labor Board has attacked that clause and we pointed out all the legal objections to it but you struck us to obtain that and insisted on it until around November 14th, and to a certain extent, still are insisting on it today. So, we cannot see how you can expect us to count that as a concession.

You claim that there was tradition contractual language providing that where the union is certified or recognized as a legitimate collective bargaining agent, the contract will apply to all future coal operations and coal lands held by the employer or any subsidiary or affiliate. Language referring to UMWA representative status at a new mine first appeared in your July, 1975 proposal after we had objected and after Amax had already suffered more than six months of an unlawful strike. That qualification of representative status was removed from your November 14, 1975 proposal. To agree to extend the contract to future acquired and separate bargaining units is, as we told you many times at the bargaining table, unlawful because it deprives the employees at a new bargaining unit of the right to have their say in selecting their own representative and in determining what the new terms and conditions of employment will be. The latter flies in the face of the provisions of the Taft-Hartley Act which would prevent pre-hire agreements in anything other than the construction industry.

Additionally, your withdrawal of that clause was not complete because you are still insisting on something similar to that with respect to subsidiaries or affiliates as well as Amax.

In view of that, we hardly feel that that is a concession, particularly since continued insistence on your part on that was unlawful and could force us to violate the law and the rights of future employees.

With respect to your insistence on the vague language concerning District Agreements, we made every effort to try to ascertain what they were. One of your negotiating teams even agreed early in negotiations that there were no District Agreements applicable to the Belle Ayr Mine; notwithstanding that your negotiating teams continued to insist on that clause even though we objected to including something in the contract that had no application to our employees or the bargaining unit, that it was illegal to require Amax to agree to things that were agreed to or would be agreed to by others not designated by us as our representatives, particularly when we were unable to find out what those agreements were.

In view of the unlawful effect of your insistence on both clauses, we are not persuaded that it is appropriate for you to claim that you have made a substantial concession when you withdraw insistence on an unlawful demand.

From the outset of the development of the Belle Ayr Mine, the company, with the full knowledge and acquiescence of the United Mine Worker representatives, widely used sub-contractors to do construction and other work at Belle Ayr. This was done openly and in part caused by the severe lack of available numbers of skilled people in the area. From the outset of our negotiations with UMWA, Amax explained their problems with the subcontracting limitations that the UMWA proposals imposed on their sub-contracting of construction work and further pointed out that it was unlawful for the Mine

Workers to insist on that since the UMWA knew that Amax was not engaged in the building and construction industry and that Amax's agreement to limit their sub-contracting of construction work was not protected by the law. Notwithstanding all of the legal and practical objections, Amax negotiators made an effort to explore possible areas of agreement and try to accommodate to some of the concerns of the United Mine Workers in this area without waiving its legal objections. However, even to this day UMWA is still unlawfully insisting that Amax agree to improper limitations on the sub-contracting and construction work. We, therefore, are unpersuaded that it is appropriate for you to claim to you have withdrawn your demands in this area.

Frankly, your comment on Page 4 of your letter, that our response to your negotiators to the above-mentioned "far-ranging concessions" was a simple "we want more", is also unsupported by the facts. Amax negotiators, commencing on January 6th, laid out many of the legal objections that they had to many of the clauses in your proposal. Their ability to do this in greater detail was prevented not by Amax's unwillingness to go into greater detail but it became extremely difficult to find UMWA negotiators who would even sit down and bargain with Amax. We are concerned that perhaps you may not understand what went on at the meeting. The company's legal objections were spelled out in the January and February meetings, again in July and August and once again in October. Each time we literally started all over again from scratch and each time were were confronted with new UMWA bargaining teams who wanted to know, and to whom we have repeated, all of the positions we had taken earlier.

Following the October meetings efforts were made to try to accommodate UMWA's concerns but such efforts have not been successful. For example, in the spirit of trying to explore perhaps some type of accommodation in the unlawful areas of limiting sub-contracting of con-

struction work, we made proposals that would give due regard to existing employees and economics. For example, we proposed that construction work would be within the jurisdiction of the Mine Workers "insofar as is economically reasonable (given due consideration of cost, quality of work, availability, time and completion and other appropriate business judgments). . . ." We were both aware that it was not lawful for us to agree to bind other employers or limit ourselves from dealing with only certain employers where we are not involved in the construction industry, but we were making an effort to accommodate UMWA's concerns. Even that reasonable limitation, as it later turned out, was not acceptable and when the language in parenthesis was added, you claimed that we were asking for "more" and had reneged. In truth, all we had done was to add language that had been discussed, suggested and defined in earlier discussions.

You further claim that we insisted upon the destruction of certain protections for the employees which presumably are in effect at Belle Ayr:

1. "In the event of layoffs, the right of laid off employees to be hired in any mines you may hereafter develop in District 15 before you hire new employees off the street." As we pointed out to you in various meetings, this was, in effect, an insistence on extra unit bargaining and we did not think that we either had any duty to bargain about terms and conditions at any new units that may be developed. While that provision may be important were there various mines in existence, all represented by the same representative in the same unit, we do not think you can assert that that right was in existence before at Belle Ayr. This is particularly so for when Amax negotiator first objected to the extra unit effect of the provisions in the Enabling Clause and the other provisions of the agreement and its effect on the rights of employees at new facilities to have a say in their own terms and conditions of employment, UMWA representatives advised us that those clauses notwith-

standing what they said, would not have any effect if an employee filed a petition for an election. (It should be noted your negotiators refused to put that claimed oral interpretation of your original proposal into writing. The UMWA's July proposal appeared to recognize this but it was then withdrawn from the November 14, 1975 proposal.) We also question whether employees can be said to have had a right to transfer to a new bargaining unit before the new bargaining unit exists and whether or not we can properly insist or be compelled to agree in advance that employees yet to be hired at a different bargaining unit not yet in existence, be bound by provisions which favor employees at another bargaining unit.

2. Your contention that we were removing "language protecting the right of classified employees to do bargaining unit work", is not true because the contract and our proposals already protects employees in doing bargaining unit work. Our objections were to the efforts by the UMWA to expand your jurisdiction and control into areas that had not been performed by UMWA represented employees in the past. Amax representatives frankly stated to UMWA representatives down through the entire period of the negotiations that they were unwilling to believe that they should be compelled to tie their hands with respect to work now performed before the UMWA represented individuals or individuals in the bargaining unit or where to do so was not economically feasible or as efficient for the company. Notwithstanding those objections, Amax proposed language protecting the right of classified employees in the event work was sub-contracted so that sub-contracting would not affect their jobs or cause unemployment. "Our objections were to the expansion of the bargaining unit work by the language proposed by UMWA.

3. Your statement that we are insisting on destruction of portability of pension rights is totally false. If you were sincerely interested in portability you could have agreed to our proposal on reciprocity as many other

unions have done where different funds are involved and sought that formally through your trust representative. However, you rejected that. My previous letter to you fully explains how the UMWA, by its adamant insistence on compelling Amax's Belle Ayr employees into the UMWA pension funds, does not give them any more "portability" than they now have. Your claim that Amax was depriving Amax employees of portability is not the fault of Amax but is the fault of UMWA. The UMWA, at any time, could have proposed and sought reciprocity. You did not. Notwithstanding what you claim, the facts are clear. The UMWA refused to agree to a pension plan proposed for Belle Ayr employees, which is better in benefits and better in terms of portability than anything proposed by the UMWA.

4. At various sessions in the discussion regarding seniority lists, UMWA representatives advised Amax negotiators that all that was intended by dual "panel custodians" was the right to check the records. We did not see how joint custodianship would facilitate that and told them it was agreeable to us that they do check the records anyhow. All that we can conclude is that UMWA was insisting on the old language simply because it was language with which they had been historically familiar.

Your arguments about our concern about "joint custodianship" of seniority lists, escapes us. Your negotiators were told at the bargaining table that we would not hang up on that problem, but that as a pretrial matter, we could not understand how two people jointly held anything like a seniority list. The company explained it was not going to turn its employee records over to the union and we proposed instead that we regularly send lists which the unions could check and verify and file grievances if they felt that the seniority list was not accurate. We fail to see what employee rights are involved in "joint custodianship" of seniority lists. The only thing we could determine from negotiations was that our proposal is the practice that UMWA has always

followed. We were never able to determine how it could otherwise work.

5. Your claim that we intended to take away "language protecting classified employees against sub-contracting of repair and maintenance work which *can* be performed at the mine", is again, another strawman. Our counter-proposal to you on that contained the limitations that the sub-contracting (which has been going on for as long as the mine has been operating), would not result in any unemployment of existing employees. Even after getting that kind of protection UMWA insisted on trying to extend their jurisdiction to do repair and maintenance work which UMWA had not been doing since the mine commenced operations.

In your letter, on Page 5, you say "Amax freely admitted that at least fourteen sub-contractors were illegally performed bargaining unit repair and maintenance work at the Belle Ayr property during the 1971 agreement and are still performing that work today." As a matter of fact, as the first bargaining session in January, 1975, the Amax negotiators explained, in connection with the sub-contracting proposals, that this work had been performed by outside contractors with the knowledge and acquiescence of UMWA representatives since the mine had opened. Amax has never made an effort to conceal that fact and doesn't believe that under the circumstances they did anything illegal, nor did we ever admit we did. Furthermore, no grievances have ever been on this matter. It may have been illegal to have signed this first agreement, but we observe you make no mention of this. As a practical matter, skilled employees to do this work were simply not available in the community in sufficient numbers. Furthermore the "1971 agreement" was initially signed simply as a temporary expedient sometime in 1972 as the mine was beginning to open and before a representative complement of employees were employed. This was done with the intention that Amax and the union would sit down and negotiate an agreement for

their Belle Ayr Mine later in 1974 after the mine was established.

Your comment that one of our negotiators went so far as to assert that the only mechanical and repair work that bargaining unit employees were entitled to perform is "unsophisticated" maintenance, such as "greasing and oiling", is false.

What was said was that generally speaking bargaining unit employees performed "unsophisticated" maintenance work and that the "sophisticated" maintenance work such as complex rebuilding of diesel engines was performed by outside contractors. We pointed out that this was a situation that had developed as a result of the lack of enough adequately skilled people where the mine originally opened and decisions by the company not to spend large sums of capital purchasing complex and expensive maintenance equipment, but to, in turn, utilize available capital funds in production facilities and equipment.

You further accuse Amax falsely when you say that we made a totally outlandish demand to erode a historical employee right then withdraw it and claim a significant concession.

In your letter, on Page 5, you state that a good case in point involved seniority where for many months Amax negotiators "*seemed*" to take the position that once laid off an employee had no right to be recalled for employment at the Belle Ayr Mine in the future. That statement is false and you "seem" to take the position that you know it is because you do not say we made that statement. The only thing our negotiators said was that we felt that there should be a "reasonable" limit to recall rights. We pointed out the difficult administrative probblems that arise when an employee retains seniority rights forever even though he has drifted away to get other jobs and this would ———— employer holding up the filling of positions while many people are

contacted who may not have any future or real interest in further employment at the mine.

First you make an incorrect statement and state that it is an "inhuman" proposition. We are willing to agree that it might be a hard proposition but we never made it. We would hope that you would stop accusing us of doing things which we have not done. Furthermore, your representative never before claimed our request for a limit on seniority was inhuman. They proposed ten years and we countered with two.

You accuse us of agreeing to contractual language and at a later date withdrawing our agreement. This is not accurate. At the outset of negotiations Amax has stated their first objections to the various proposals without waiving their rights. Notwithstanding this, Amax has tried to find and explore areas of agreement even on such things as the unlawful demand by UMWA for a limitation on their right to sub-contract construction.

On Page 5 of your leter you complain that it is impossible to rely on the stability of tentative agreements on particular points because you will never then be able to reach overall accord. However, it was the United Mine Workers who proposed that all proposals would be subject to agreement on a final package and if there was no acceptance on the entire package there would be no agreement on anything and it was always understood the parties were free to submit changed or new proposals at anytime, particularly where those proposals had been rejected. We have changed proposals in an effort to try to reach a form of compromise and we proposed a signoff procedure to keep track of bargaining. Amax has never withdrawn any agreement on any matter that has been signed off unless such agreement was signed under protest with the full and complete knowledge of the UMWA negotiator and with his acceptance of that condition or the union agreed to the modification. Further, the parties at the outset contemplated that there might be some adjustment and revision of their proposals.

At the January 6th meeting our negotiators raised legal objections to various clauses including the Enabling Clause of which the successorship clause is a part and which was not specifically discussed. When the UMWA refused to bargain with Amax, Amax made every effort it could to find room for an agreement and proposed various combinations of packages, none of which were accepted by UMWA and all of which were rejected by UMWA.

We still do not agree with you that your successorship clause or your insistence on it is lawful.

On Page 6 you again chide us about our bargaining on the unlawful demand you made to limit our ability to sub-contract construction work. Your accusations fail to recognize all of the negotiations and objections that have been made made before November 14th. In July, October and December, UMWA representatives were told we did not want to agree to any language on this because it was illegal. UMWA representatives were also told that simply by having made a proposal on it, Amax had not and did not intend to withdraw its legal objections. With full knowledge that the company's old proposals regarding sub-contracting construction work were no longer on the table or had been rejected by UMWA, on November 14th, UMWA turned around and claimed to accept what was no longer on the table, notwithstanding they knew those proposals were not acceptable. As we said before, at no time has the company made any changes in signed-off proposals unless there was a protest raised at the signing as in the case of staggered vacation provision or unless mutually agreed. This was explained at the subsequent bargaining sessions, and to show that Amax was still trying, Amax proposed additional accommodating language on December 7th and 8th. Your statement that our negotiators rejected their own language and made a completely new proposal is false. Amax had withdrawn its subcontractor proposal by virtue of their legal objections in their meetings with UMWA negotiators in

July and August. We can understand how your existing negotiators may not be familiar with this since they profess to know litle or nothing about the negotiations that had gone on prior to October of 1975. However, they were informed of these objections in October. Furthermore, UMWA's belated acceptance did not clean up the legal infirmities and objections in that clause.

It is true that at our Denver meeting on October 20 and 21st, Amax negotiators informed the UMWA representatives that they wanted the right to load coal on Sunday but not from the pit. At that time there did not seem to be much difficulty expressed by UMWA representatives concerning working out something to accommodate Amax's problems in this area. At the December 7th and 8th, 1975 meeting in Salt Lake City, Amax negotiators further explained to the UMWA negotiators that they were continuing to have problems in getting trainloads out because of the railroad scheduling problems even though they had hoped that these problems would diminish, they were continuing. We then proposed that because of our inability to load coal from the pit Amax was losing trains and that this problem would become more severe as additional companies opened lines in the area. You accuse our negotiator of not providing you with documentation supporting our new position and we are as surprised by that as we are the reaction of your negotiators in February when you asked for that documentation. In December, in Salt Lake City and again in February our negotiators gave you our reasons and at no time agreed to give you any further documentation nor do we believe it is necessary. The train schedules are a matter of public record.

You also claim that on October 20 and 21 in Denver, Amax negotiators did indicate the "opinion" that they "believed idle day work should be shared within classification. This was indicated but only in the belief that the mine might have ———— non-production days. As it turned out in December, particularly with the

problems resulting from the train schedules, the company requested a change in its proposal which would allow Amax to load from the pit on Sunday; hence, there would be no idle day. Therefore, on December 7th, 1975, in the process of discussing our need for seven day production, we did not agree to sharing idle day work within classification on seven day operations because there would be no idle day on a seven day production program.

You also contend that Amax's March 14, 1975 proposals was our first complete package. That is not true. Also, with respect to Article IX relating to staggered vacation, we signed this under protest because the UMWA was insisting on this provision as well as others upon a predetermined fixed position and/or upon whatever the outcome of the Peabody group negotiations were. While we signed off on February 14, 1975, under protest, we raised objections to not having two separate vaction periods and the UMWA representatives at that time said "you may change the policy." Lastly, it was understood on October 21, 1975, by those present for both the company and the union that the vacation would be split into two periods, notwithstanding the language, consistent with the prior practice at Belle Ayr.

We take issue with your comment contained on Page 7 of your letter that Amax had previously put into effect a transportable single mine pension plan with special vesting provisions without presenting it to your negotiators or allowing UMWA to bargain on the subject. That statement is simply false. Amax proposed their own pension, health and welfare provisions from the outset in the January 6th and subsequent proposals. Your negotiators have, in various way, adamantly rejected any of these proposals. On March 14th, UMWA received a pension proposal to match the UMWA proposal and to accommodate the portability problem without changing the vesting schedule, it was orally proposed that reciprocity be adopted. However, if that was impossible, Amax

proposed in the alternative, a one year or immediate vesting program. The outlines of the program and benefits are presented to UMWA representatives in writing at various times. Amax, throughout the negotiations, has made every effort to keep UMWA informed and to try to avoid acting without your representatives knowledge even when Amax may not have had any duty to bargain with the UMWA. You are aware of the pension plan that is in effect because we gave ———— you a copy of it and ———— you before the end of the year that in view of the peculiar ——— situation that had arisen that it was necesary for Amax to proceed with the alternative plan, UMWA would not agree to reciprocity and failure to make action would result in less of what portability the employees had if the immediate vesting program was not adopted.

We are operating at our Belle Ayr Mine on the basis of the provisions of our March 14, 1975 final proposal to you with the exception of those items which we have otherwise subsequently discussed and proposed to you at the bargaining table, including the pension program. We gave you opportunity to bargain about other changes in our March 14th proposal, which proposal you rejected. Your rejections of these proposals are now again affirmed by your March 15th letter.

We hope that UMWA will reassess its attitude toward bargaining with us and make a real and meaningful effort to accommodate our reasonable needs.

Sincerely yours,

/s/ John S. Cairns
JOHN S. CAIRNS
Director—Industrial Relations

JSC:b

JOINT EXHIBIT 1(jjj)

Mr. Mike Trbovich, Vice President
United Mine Workers of America
United Mine Workers Building
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Trbovich:

I am in receipt of your letter to me enclosing a copy of a letter you received from UMWA Trustee, Harry Ruga, on the subject of reciprocity between the United Mine Workers of America Pension Trust Fund and the Amax Coal Company Belle Ayr Mine Pension Trust Fund.

In the first place we question whether any amendment of the trust documents or plan documents are necessary. No additional benefits or rights are created than are already recognized by those Trusts.

You only, apparently, "verbally" asked Mr. Ruga if the Trustees could grant reciprocity. It seems to me that this is a question that might best be directed to your attorneys or the Trust Fund attorneys since it calls for a legal interpretation of the powers and duties of the Trustees, and the scope of the Trust and the Plan.

We further note that you did not urge your representative, Mr. Ruga, to seek or press for reciprocity nor did you take a position apparently in favor of it. We also note that sometime ago your UHW bargaining committee advised us that they had contracted the BCOA bargaining representatives and that the BCOA said that they would not agree to reciprocity.

We recognized long ago that your Trustee and the BCOA Trustee were bound to follow the directions and instructions of their principals just as any other collective bargaining representatives would do. However, it is also the duty and the right of the Trustees to interpret and to apply the provisions of the trust and plan

much as the representatives of the parties do in interpreting and applying in the terms of a collective bargaining agreement once it is negotiated and signed by the parties.

We feel that if you sincerely wanted to preserve the portability of Amax employees, you could have instructed your Trustees to seek reciprocity and as you are aware, the Trust provides arbitration procedures for resolving any dispute that exists between the Trustees. However, you did not even try to do that. The same is true in connection with any disputes that arise between the parties to the collective bargaining agreement.

If an Amendment was necessary it probably would only be necessary to "implement the plan". There is plenty of authority for the Trustees to do that under Article VIII, (3) (1) of the Plan. We also believe that the Trustees have the inherent power to amend the Trust or adopt regulations which would insure the employees of portability without creating new rights other than those of the same kind already extended under the provisions of the Trust and the Plan.

Your letter refers to the BCOA's views on the matter, which you say makes resolution of the problem futile. We are unpersuaded. An extremely broad grievance and arbitration procedure exists in the BCOA Agreement and any dispute, even not one covered by the Agreement, could be resolved by arbitration if you would only seek reciprocity. As we pointed out before, if there was a difference between the Trustees, that again is resolvable by the arbitration process as is provided for in the Trust documents.

In addition to the foregoing, your comment about UMWA's "strongly held views" on the advantages of portability as a reason for rejecting our current Pension proposal is not convincing for several reasons:

A. Your fund already grants reciprocity to employees of employers who are not signatory to the BCOA

Agreement (the bituminous coal wage agreement) or any agreement. (See Page 17, Article IV (a) and Page 23, Article IV (a) (5) relating to non-signatory services contained in your UMWA Pension Plan. In addition to that you have permitted the Kiewitt Corp. and other employers in separate bargaining units who are not signed to the BCOA Agreement (bituminuous coal wage agreement) to participate in the plan, but only because they have agreed to all of the language contained in the bituminuous coal wage agreement concerning the Pension Plan, including the agreement to accept as their representative on the Trust, the representative selected by the BCOA.

B. Amax proposed reciprocity and alternatively an immediate or one-year vesting program before and after March 14, 1975 to avoid any possible objection to their program based on portability. Amax did this at a time when they were faced with UMWA's unlawful demands for participation in your Funds because of the requirement, among other improper things, that Amax contribute to the 1950 Benefit Trust Funds when the Belle Ayr bargaining unit had no employees who were either participating or who would ever participate in those funds. The UMWA later withdrew that illegal provision from their demand, recognizing its impropriety but not until they had subjected Amax to more than six months of bitter strike action and harassment to in part force Amax to agree to that improper demand.

C. Amax's immediate or one-year vesting alternative provides even *more* portability than the UMWA Pension Plan. Their program requires a minimum of ten years service in order for a person to be eligible for Pension and their service prior to retirement must end with an employer who is signa-

tory to the bituminuous coal wage agreement or some other agreement that the UMWA has with an employer; their plan further limits service in order to be compensable to the bituminuous coal industry. On the other hand, Amax's Plan is portable wherever employees are employed, after only *one* year of service.

D. Your comment that reciprocity is "impossible", we believe is not true, but it is descriptive of the fact that you do not want it to be possible and will not seek to bring it about, notwithstanding the fact that your plan does recognize reciprocity by also recognizing non-signatory service.

While Amax Coal Company Belle Ayre Mine Pension Plan provides those employees with greater portability than they had before under the old UMWA Plan, it was the only alternative if Amax was unable to lawfully bargain with UMWA. Amax delayed as long as possible in implementing the immediate vesting proposal in the hopes that UMWA would ultimately give Amax's reciprocity proposal fair consideration. When it appeared that would not occur and other legal impediments to continued bargaining with the UMWA arose in December (such as the Petition for an election by the employees at Belle Ayr Mine, who then presented Amax with a Petition by an organization called NEW ACME, which claimed to represent a substantial majority of the employees) we notified UMWA we were unable to wait any longer and we were opting to implement the immediate vesting proposal we had put into effect in the alternative as a result of the rejection of the March 14, 1975 final proposal. This action was also triggered by the fact that we were advised that in order to deduct pension contributions for 1975, Amax had to have a pian implemented and contributions made before December 31, 1975. Our representative notified your Mr. Banks and Mr. Trumka of this late in December.

This assured that Belle Ayr employees' benefits are "portable" and we submit that the facts and the records demonstrate they are even *more* portable than if you had agreed to our reciprocity proposal. UMWA's continued and adamant refusal to entertain Amax's proposals which are better both dollarwise and portability wise than existing UMWA benefits, we believe is not good for those employees and would require this company to give up their right to select its representative to act for it in administering the vitally important term and condition of employment, namely, pensions. That we are not willing to do.

Very truly yours,

John S. Cairns
Director—Industrial Relations

JSC:bp

cc: Rick Bank
Rich Trumka
Nick Halamandaris
Bill Furtado
Frank Stevenson
Dell Brownfield

JOINT EXHIBIT 2

Article XI—SICKNESS AND ACCIDENT BENEFITS

Section (a) General Purpose

The general purpose of the Sickness and Accident Benefits Plan established by this Article is to protect Employees against financial hardship resulting from sickness or accident suffered on or off the job, by providing compensation for earnings lost.

Section (b) Eligibility

Any Employee with six (6) months or more classified employment with the Employer who becomes disabled on or after May 1, 1975, as a result of sickness or accident, so as to be prevented from performing his regular classified job, and whose disability is certified by a physican legally licensed to practice medicine, shall be eligible to receive Sickness and Accident Benefits under the Plan. An Employee whose disability is the result of a mine accident suffered while he has been a classified Employee of the Employer shall be eligible to receive Sickness and Accident Benefits effective with his first day of classified employment. Benefits will not be payable for any period during which the Employee is not under the care of a licensed physician.

For the purposes of this Article, "classified employment" means employment in a classified job which has not been broken by quitting, discharge, retirement, or refusal to return to work following layoffs pursuant to the terms of Article XVII.

Benefits shall not be payable in the event that the Employee's employment had been terminated, or if he was laid off or was granted a leave of absence prior to his disability, or in the event that his disability is the direct result of an injury suffered prior to his employment with the Employer or while the Employee is engaged in employment other than classified employment with his Employer.

Benefits shall be terminated in the event that the Employee (1) receives a pension pursuant to Article XX; (2) receives Social Security old-age benefits; (3) accepts employment with another signatory Employer or with any employer not signatory to this Agreement; or (4) voluntarily severs employment with his Employer.

If, during a period when an Employee receiving Sickness and Accident Benefits is recovering from his disability, his Employer offers him a light-duty classified job, the Employee shall have the option to accept such employment, and Sickness and Accident Benefits shall terminate it he does so. For the purposes of this article, "light-duty" shall be defined as including any job in which occupational hazards, lifting of weights, and exposure to extremes of temperature, dampness, and dust are substantially less than those of the job held by the Employee at the time of his disabling accident or illness.

Section (c) Commencement and Duration of Benefits

Sickness and Accident Benefits shall begin with the first day of disability resulting from an accident, and with the tenth day of disability resulting from sickness, except that if the Employee is hospitalized because of a disabling sickness requiring surgical treatment or intensive care, benefits shall begin with the first full day of hospitalization.

Benefits for disability resulting from an accident, either on or off the job, shall be payable for a maximum of 52 weeks, regardless of the length of the Employee's classified emploment with the Employer at the time of the accident.

Benefits for disability resulting from sickness shall be payable according to the following schedule:

Length of Classified Employment with the Employer	Maximum Number of Weeks
At least 6 months but less than 5 years	26
5 years or more	52

If an Employee returns to work after receiving Sickness and Accident Benefits for less than the maximum number of weeks to which he is entitled, and is then absent again within 90 days due to the same sickness or accident which disabled him originally, there shall be no waiting period for benefits payable during the remaining weeks of his eligibility but the period during which he again receives benefits will be considered with the first period as one continuous period of disability. If the second absence results from a different sickness or accident, the first absence does not affect the duration of benefits for which the Employee shall be eligible for the second absence. If the Employee returns to work for 90 calendar days between two periods of disability, the second period shall not be considered as being due to the same sickness or accident as the first disability.

A change in the cause of the Employee's disability during a continuous period of absence from work on account of disability does not extend the maximum duration of Sickness and Accident Benefit payments.

In the event that an Employee becomes disabled prior to the commencement of a strike or work stoppage, his eligibility for benefits shall not be affected by the strike or work stoppage. In the event that an Employee becomes disabled during a strike or work stoppage, the seven-day waiting period, if applicable, will run, but the Employee shall not be entitled to receive benefits for any day of disability during the strike or work stoppage.

Section (d) Amount and Payment of Benefits

The amount of Sickness and Accident Benefits payable under this Plan shall be $100 per week, pro-rated over a seven-day week (Monday through Sunday).

Benefits shall be reduced by deducting any or all of the following forms of compensation to the extent that they are applicable to and are payable for the same sickness or accident and the same period for which the Employee qualified for Sickness and Accident Benefits under this Plan: (1) Workmen's Compensation benefits for tem-

porary or permanent disability, including state Black Lung benefits; (2) State or Federal disability benefits, exclusive of veterans' benefits; (3) Social Security primary disability insurance benefits; and (4) Federal Black Lung benefits.

Payment of Sickness and Accident Benefits shall not be made for any days during an Employee's disability for which he receives wage allowances pursuant to this Agreement, but the duration of Sickness and Accident Benefit for which the Employee is eligible shall be extended by an equal number of days.

Payment of benefits shall be made by check every two weeks, for all days during the preceding two weeks in which the Employee was eligible for benefits.

Section (e) Filing of Claims for Benefits

To be eligible for payment of benefits, the Employee must give written notice of disability to the Employer, including certification by a licensed physician upon request by the Employer, within 21 days after the day claimed as the first day of disability. The Employer shall be responsible for promptly forwarding the Employee's claim to an acceptable insurance carrier as described in section (f) of this Article, unless the Employer elects to provide benefits directly, in which case any undisputed claim shall be paid within fourteen days of receipt of the Employee's claim.

Section (f) Structure and Administration

The establishment, administration, and operation of the Sickness and Accident Benefits plan shall be the joint responsibility of the Employers and the Union.

Not later than March 1, 1975, the Trustees of the United Mine Workers of America Health and Retirement Funds as defined in Article XX shall prepare and make available to the Employers and the Union a list of at least five (5) and initially not more than fifteen (15) acceptable insurance carriers, based upon scrutiny

of model plans provided by the respective carriers and such other criteria as the Trustees may deem pertinent. Subsequent thereto, the Trustees may add additional carriers to the list at their discretion. Upon the approval of the Employe. , and the Union, but not later than April 1, 1975, the list shall be distributed to all signatory Employers. Not later than May 1, 1975, each Employer shall be solely and individually responsible for provision of the benefits set forth in this Article, either directly or through such of the acceptable insurance carriers as he may designate. If an Employee elects to provide benefits directly, he shall notify the Trustees and shall file with the Trustees an agreement to conform to the purposes and objectives of this Plan.

The Employer or his insurance carrier shall have the right to take reasonable steps to investigate the factual aspects of an Employee's claim, including examination of the Employee by a physician at the Employer's or carrier's expense, in the event of a dispute over medical evidence. A dispute unresolved after such investigation shall be subject to resolution at the fourth step of the grievance procedure as set forth in Article XXIII (Settlement of Disputes). A representative of the Department of Occupational Health of the International Union shall have the right to assist a grievant.

The Trustees shall have the right to investigate fully any or all disputed claims in order to establish consistency of coverage and of the awarding of claims and benefits. Based upon such investigation, the Trustee shall, at the end of the first 12 months experience with this Plan, prepare a report to the Employers and the Union and shall, pursuant to such report, prepare a revised list of acceptable insurance carriers, based upon the experience of the preceding year. The list may be further revised thereafter at the discretion of the Trustees. The Trustees shall have the power to remove any insurance carrier from the list for failure to provide the benefits described in this Article in a manner consistent with the terms of the Plan, and, in the event that an insurance

carrier is so removed, it shall be the responsibility of any affected Employer to cancel any policy or policies he may have with any such disqualified insurance carrier, and to replace such policy or policies with a policy or policies provided by an acceptable insurance carrier, not less than 30 days after notification by the Trustees.

If, on the basis of their investigation of disputed claims, the Trustees find evidence than an Employer who elects to provide benefits directly has done so in a manner inconsistent with the terms of the Plan, the Trustees shall first inform such Employer and shall request that he establish coverage through any of the acceptable insurance carriers that he may designate. If the Employer fails to do so, and if the Trustees find that he is continuing to provide benefits in a manner inconsistent with the terms of the Plan, the Trustees may take such action as they deem necessary, including any and all legal means, to enforce compliance with the terms and objectives of the Plan.

In the event that a carrier makes available additional or extended coverage based upon Employee payment of premiums, or an Employee chooses to seek coverage from another carrier, nothing in this Article shall be construed as prohibiting such voluntary expansion of coverage. At the request of the Employee, and in accordance with the terms of Article XV (Checkoff), the Employer shall deduct such premium payments.

JOINT EXHIBIT 2

ARTICLE XX—HEALTH AND RETIREMENT BENEFITS

Section (a) General Purpose

This Article makes provision for pension, health and other benefits for Employees covered by this Agreement, and for former Employees who were covered under the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 Fund"), and for the spouses and dependents of such Employees. The benefits to be provided are as set forth under separate plans and trusts described in Sections (b) and (c) of this Article.

A summary of the benefits to be provided appears immediately following this Article.

For purposes of this Article, the 1950 Pension Plan and Trust, the 1974 Pension Plan and Trust, the 1950 Benefit Plan and Trust and the 1974 Benefit Plan and Trust and each of them shall be a continuation of the UMWA Welfare and Retirement Fund of 1950 (hereinafter the 1950 Fund) provided that:

(1) The 1950 Pension Trust shall be solely responsible for all indebtedness, accounts payable, claims, causes of action and other liabilities (except as provided in (2) below) incurred or arising prior to December 6, 1974, and shall likewise be entitled and shall succeed to all assets held in trust by the 1950 Fund and all assets due the 1950 Fund on said date and to all rights heretofore accruing to or exercisable by the 1950 Fund;

(2) For all participants covered by the 1974 Pension Plan and Trust, the 1974 Pension Trust shall assume the liabilities for pensions including those arising out of past service credits attributable to employment prior to December 6, 1975.

Each participant and beneficiary shall be entitled only to the pension benefits provided in and paid from either the 1950 Pension Plan and Trust or the 1974 Pension Plan and Trust, and each participant, beneficiary and dependent shall be entitled only to the benefits provided in and paid from either the 1950 Benefit Trust or the 1974 Benefit Trust.

The general purpose of the plans established by the Article shall be to provide health care for working and retired miners and their dependents; pensions for miners upon their retirement; and health care and financial support for eligible disabled miners, miners' widows and surviving dependents as provided by each of the Trusts and Plans established under this Article.

It is agreed that the Trusts established in this Article are irrevocable Trusts created pursuant to, and within the scope of, Section 302(c) of the Labor-Management Relations Act, 1947, and they shall endure as long as the purposes for their creation shall exist.

Section (b) 1950 Plans and Trusts

Effective December 6, 1974, the name of the 1950 Fund is changed to the United Mine Workers of America 1950 Pension Trust ("1950 Pension Trust"). The 1950 Pension Trust is incorporated by reference and made a part of this Agreement. The terms of the 1950 Fund are hereby amended by substituting the terms of the 1950 Pension Trust and of the United Mine Workers of America 1950 Pension Plan ("1950 Pension Plan"). The 1950 Pension Plan is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1950 Pension Trust are as set forth in the 1950 Pension Plan.

Effective December 6, 1974, there is established a benefit plan and trust, which trust shall be known as the United Mine Workers of America 1950 Benefit Plan and Trust ("1950 Benefit Trust"). The 1950 Benefit Trust is incorporated by reference and made a part of this Agreement. The 1950 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1950 Benefit Trust.

Upon the discharge of all its obligations, any remaining assets in either the 1950 Benefit Trust or the 1950 Pension Trust shall, upon termination of such Trusts, be

transferred to the 1974 Benefit or Pension Trusts, respectively.

Section (c) 1974 Plans and Trusts

(1) Effective December 6, 1974, there is established a pension trust to be known as the United Mine Workers of America 1974 Pension Trust ("1974 Pension Trust"), which is incorporated by reference and made a part of this Agreement. The pensions to be paid from the 1974 Pension Trust are as set forth in the United Mine Workers of America 1974 Pension Plan ("1974 Pension Plan"), which is incorporated by reference and made a part of this Agreement. This Plan is a continuation of the pension program of the 1950 Fund and is effective December 6, 1974.

(2) Effective December 6, 1974, there is established a benefit plan and trust, which trust shall be known as the United Mine Workers of America 1974 Benefit Plan and Trust ("1974 Benefit Trust"). The 1974 Benefit Trust is incorporated by reference and made a part of this Agreement. The 1974 Benefit Trust provides health and other benefits, not including pension benefits, and the terms and conditions under which those benefits will be provided are as set forth in the plan under the 1974 Benefit Trust.

(1) During the life of this Agreement, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute to the Trusts established in this Article the amounts specified below based on cents per ton on each ton of two thousand (2,000) pounds of sub-bituminous coal or lignite produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts established in this Article the amounts specified below based on cents per hour worked by each of the Employer's Employees who perform classified work under this Agreement:

(i) Into the 1950 Pension Trust: for the period beginning January —, 1975 and ending December 6, 1975, ——— per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, ——— per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, ——— per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning January —, 1975, and ending December 6, 1975, ——— per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, ——— per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, ——— per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period beginning January —, 1975, and ending December 6, 1975, ——— per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, ——— per ton on each such ton, plus ——— per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, ——— per ton on each such ton, plus ——— per hour on each such hour worked; and

(iv) Into the 1974 Benefit Trust: for the period beginning January —, 1975, and ending December 6, 1975, ——— per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, ——— per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, ——— per hour in each such hour worked;

(v) In the event that the 1950 Pension Trust, the 1950 Benefit Trust, the 1974 Pension Trust and the 1974 Benefit Trust are not established on the date that any contributions become payable under this Agreement, such contributions shall be paid to the 1950 Fund.

In addition to the contributions indicated above, during the life of the Agreement, each signatory Employer shall, for the periods of time indicated below, contribute to

the Trusts established in this Article in the amounts shown below based on cents per ton on each ton of two thousand (2,000) pounds of sub-bituminous coal or lignite after production by another operator, procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made (amounts shown below include cents per hour worked contributions covered to tonnage equivalents):

(i) Into the 1950 Pension Trust: for the period beginning January —, 1975, and ending December 6, 1975, ——— per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, ——— per ton on each such ton; and for the period beginning December 6, 1976, and ending when this agreement is terminated, ——— per ton on each such ton;

(ii) Into the 1950 Benefit Trust: for the period beginning January —, 1975, and ending December 6, 1975, ——— per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, ——— per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, ——— per ton on each such ton;

(iii) Into the 1974 Pension Trust: for the period begining January —, 1975, and ending December 6, 1975, ——— per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, ——— per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, ——— per ton on each such ton; and

(iv) Into the 1974 Benefit Trust: for the period beginning January —, 1975, and ending December 6, 1975, ——— per ton on each such ton; for the period beginning December 6, 1975, and ending December 6, 1976, ——— per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, ——— per ton on each such ton.

(v) In the event that the 1950 Pension Trust, the 1950 Benefit Trust, the 1974 Pension Trust and the 1974

Pension Trust are not established on the date that any contributions become payable under this Agreement, such contributions shall be paid to the 1950 Fund.

The parties hereto mutually agree that, if at any time during the term of this Agreement a court or tribunal of competent jurisdiction determines by a final decision that is not appealable that the provision appearing in the paragraph just preceding is invalid or in violation of the National Labor Relations Act, 1947, as amended, or other Federal or state law, the parties shall, at the option of and upon demand by the Union without affecting the integrity of any other provision of this Section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this Agreement in replacement of the provision found invalid or unlawful.

Definition of Hours Worked

Hours of work for purposes of Employer contributions to the various Health and Retirement Trusts shall include all hours worked, or fractions thereof, by Employees in a classified job covered by this Agreement. Hours actually worked for which a premium pay of any type is provided shall be treated for purposes of Employer contributions to the Trusts as though worked on a straight-time basis. Reporting pay for hours not actually worked shall not be included for the purpose of making Employer contributions to the Trust.

At any time during the term of this Wage Agreement, the Employers and the Union may agree upon a reallocation of contributions to be paid under the respective subdivisions (i) and (ii) in this Section, which will increase the cents per ton to be contributed into the 1950 Pension Trust and correspondingly will decrease the cents per ton to be contributed by the Employers into the 1950 Benefit Trust, or which will decrease the cents per ton to be contributed into the 1950 Pension Trust and correspondingly will increase the cents per ton to be contributed by the Employers into the 1950 Benefit Trust, provided that notice shall be given to the contributing

Employers of the cents per ton to be allocated to each Trust at least 30 days prior to the date the contributions become due and owing to the respective Trusts, subject to the following terms and conditions:

(a) No monies previously paid into or due and owing to either Trust nor any assets of either Trust shall be transferred to the other Trust:

(b) No decrease in the cents per ton to be contributed to the 1950 Pension Trust shall be adopted which can reasonably be expected to cause the 1950 Pension Trust and Pension Plan to fail to meet the minimum funding standards set forth in Section 302 of Title I, Subtitle B, Part 3, of ERISA or Section 1013 of Title II, Subtitle A, Part I of Erisa, or to fail to satisfy any applicable provision of the Internal Revenue Code of 1954, including Sections 401 and 501 of said Code:

(c) No increase in the cents per ton to be contributed to the 1950 Pension Trust shall be adopted which will increase the contributions of the Employers to such Trust to an amount in excess of those amounts which, for Federal income tax purposes, are fully deductible by said Employers when paid into such Trust, pursuant to the provisions of the Internal Revenue Code of 1954;

(d) No reallocation of the contributions to be paid to the two Trusts shall be made which will increase the total combined contributions required by this Article to be made by the Employers to those two Trusts; and

(e) No decrease in the cents per ton contributed to the 1950 Benefit Trust shall be adopted which will result in any substantial reduction of the benefits currently provided in the 1950 Benefit Trust, nor shall any change in the cents per ton to be contributed to the 1950 Benefit Trust be adopted which will cause the contributions of the employers to such Trust not to be fully deductible as paid or accrued under the applicable provisions of the Internal Revenue Code of 1954.

(2) The Trustees are hereby directed to establish a royalty rate or rates for bituminous coal which is recovered from slurry ponds, sludge piles, and other coal

refuse, which is sold during the life of this Agreement, and such royalty rate will be paid on each ton of such coal recovered for use or for sale. Royalty rates currently being paid for coal recovered from slurry ponds, sludge piles and other coal refuse shall remain in effect unless and until changed by the Trustees. All royalties payable by Employers pursuant to this paragraph shall be divided among the 1950 Benefit Trust, the 1974 Benefit Trust, the 1950 Pension Trust and the 1974 Pension Trust in proportion to the total contribution paid to each such Trust by all Employers for the month preceding the month in which such royalty is due and payable.

(3) The obligation under this Section of any Employer signatory hereto shall be to contribute the amounts specified in this Section.

(4) The obligation to make payments to the Trusts specified in this Article shall become effective on the dates specified in the respective Subdivisions (i) through (v) of this Section, and the first payments are to be made on the 10th day of each month after such specified dates, and thereafter continuously on the 10th day of each succeeding calendar month.

(5) It shall be the duty of each of the Employers signatory hereto to keep current said payments due to the Trusts, and to furnish to the International Union, United Mine Workers of America and to the Trustees of those Trusts a monthly statement showing on a mine-by-mine basis the full amounts due hereunder and the tons of coal produced, procured or acquired for use or for sale and the hours worked with respect to which the amounts are payable. Payments to those Trusts shall be made by check payable, as appropriate, to:

"Trustees of the United Mine Workers of America 1950 Pension Trust"

"Trustees of the United Mine Workers of America 1950 Benefit Trust"

"Trustees of the United Mine Workers of America 1974 Pension Trust"

"Trustees of the United Mine Workers of America 1974 Benefit Trust

The Trustees are hereby authorized to require each signatory Employer to make payment of all contributions to the 1950 Benefit Trust, the 1974 Benefit Trust, the 1950 Pension Trust and the 1974 Pension Trust by a single check made payable in such manner as may be specified by the Trustees.

(6) Payments shall be delivered or mailed to the office of the Trusts currently located at 2021 K Street, N. W., Washington, D. C. 20006, or as otherwise designated by the Trustees of those Trusts.

(7) Failure of any Employer signatory hereto to make full and prompt payments to the Trusts specified in this Article in the manner and on the dates herein provided shall be deemed a violation of this Agreement. This obligation of each Employer signatory hereto, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Employer during the life of this Agreement and it shall be deemed a violation of this Agreement, if any mine, preparation plant or other facility to which this Agreement is applicable shall be sold, leased, subleased, assigned, or otherwise disposed of for the purpose of avoiding any of the obligations hereunder.

(8) Each Employer agrees to give proper notice to the President of the local union at the mine by the 18th day of each month that the Employer has made the required payment to the Trusts for the previous month, as required by this Article, or is delinquent in such payment, such notice to set forth the amount paid to the Trusts, or the amount of the delinquency, the tonnage produced and the hours worked with respect to the mine or mines under the jurisdiction of such local union.

(9) Title to all the monies paid into and/or due and owing to the Trusts specified in this Article shall be vested in and remain exclusively in the Trustees of those Trusts. It is the intention of the parties hereto that those Trusts shall constitute irrevocable trusts and that no benefits or money payable from those Trusts shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and

that any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void.

(10) It is understood that the individual Employees of Employers agree, through their representative, the United Mine Workers of America, to surrender any personal or individual right to or interest in monies paid or required to be paid to the Trusts pursuant to these agreements (which monies might otherwise have been paid for wages or other benefits to such Employees), in consideration of the benefit which is provided by the pooling of such monies into common funds to be applied to the benefit of the designated beneficiaries pursuant to the Trust instruments.

(11) Any judgment obtained by the Trustees of the Trusts established pursuant to this Agreement for a default giving rise to damages accruing to more than one of the Trusts established hereunder shall be allocated by the Trustees among such Trusts in proportion to the amounts owing to each which gave rise to such judgment.

Section (e) Responsibilities and Duties of Trustees

(1) Each Trust shall be administered by a Board of three Trustees, one of whom shall be appointed by the Employers; one of whom shall be appointed by the Union; and one of whom shall be a neutral party, selected by the other two. The Trustees, or their duly appointed successors, shall serve for the duration of the Agreement and as long thereafter as the proper continuation and administration of the Trusts shall require. The representative of the Employers on the Board of Trustees shall be C. W. Davis, Bluefield, West Virginia; the representative of the Union on said Board of Trustees shall be Harry Huge, Washington, D. C.; and Paul R. Dean, Washington, D. C., is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Trusts.

(2) It is the intent and purpose of the contracting parties that full cooperation shall be given by each of them to one another, to the Trustees provided for under this Article, and to all affected mine workers, to the even-

tual coordination and development of policies and working agreements necessary or advisable for the effective operation of the Trusts and Plans.

(3) Action which may be required by the Employers in connection with any matter hereunder, including but not limited to the appointment of a successor Trustee, may be taken by those Employers who are parties to this Agreement, and authorization, approval or ratification of Employers representing fifty-one per cent (51%) or more of the total contributions made to the Trusts during the calendar year (or such shorter period which may have elapsed after the effective date of this Agreement) previous to that in which the action is taken shall be sufficient and shall bind all Employers.

(4) All covenants, rights and obligations accruing to the Trusts, and Benefit Plans, and the Trustees of the Pension and Benefit Trusts and Plans, and all breaches, violations and/or defaults of any provision of this Article pertaining to the Trusts and Plans, the Trust Agreements, or Pension Plans, shall be enforced by the Trustees, at their discretion, through any and all available legal means, without first exhausting the grievance and arbitration procedures set forth in this Agreement, and such Trustees shall determine whether any provision of this Article pertaining to the Trusts and Plans, the Trust Agreements or Pension Plans has been breached, violated or is in default.

Section (f) Audits, Reports and Notices

(1) It is agreed by the contracting parties that annual independent audits of the Trusts shall be made by independent certified public accountants to be designated by the Trustees of the Trusts. A statement of the results of such audits shall be sent to the contracting parties and shall be made available upon written request to any working or retired miner or to any beneficiary either by mail or at the principal office of the Trusts, or at such other place as may be designated by the Trustees.

(2) If the Trustees determine that there is reasonable cause to question the accuracy of the sums paid under

Section (d) of this Article, or of any verification thereof made by an Employer for a given monthly or annual period, the Employer shall, upon written request by the Trustees, make available for inspection and/or copying at reasonable times and places to a representative of the Trustees, those records which are necessary to verify the accuracy of the sums paid.

(3) A complete accounting, on a mine-by-mine basis, of contributions received by the Trusts under this Article shall be furnished by the Trustees, at least on a quarterly basis, to the International Union. Such an accounting will also be supplied to the District and Local offices of the Union with respect to the mine or mines under their jurisdiction. Such accountings shall include tonnages of coal produced and hours worked with respect to which contributions were paid, together with an identification of any period or periods in which contributions were delinquent, showing the amounts of such delinquencies. The Trustees shall take such action as they deem appropriate to collect any such delinquencies, and shall advise the International Union and the appropriate Districts and Locals of the Union, on at least a monthly basis, of such delinquencies, as long as such delinquencies continue.

(4) Upon the written request of any International, District or Local officer of the Union, the Trustees shall make available within seven (7) days of receipt of such request an up-to-date accounting of contributions made and delinquencies outstanding, in respect to any mine or related facility with respect to which such officer has union jurisdiction.

Section (h) Administration of Trusts

(1) Each Employer shall make available to the Trustees within a reasonable time such information as the Trustees may determine to be reasonably required for the purpose of administering the Trusts and Plans.

(2) The Trustees shall respond to all written requests for information, applications, and other communications from beneficiaries within 15 working days from their re-

ceipt at the office of the Trusts. A response from the Trustees may be either a telephonic communication or a letter acknowledging receipt of such communication from the beneficiary. A pension application must be initially approved or denied within 12 weeks of the receipt of the application. The foregoing shall not apply in the event of delays caused by conditions beyond the control of the Trustees.

(3) Within six months after the effective date of this Agreement, the Trustees shall develop a suitable plan for policing and monitoring the rolls of those entitled to benefits from the Trusts. On at least a quarterly basis, the Trustees shall have available a complete listing of current beneficiaries, identified by UMWA district and local union jurisdiction, if applicable. The Trustees shall promptly investigate and determine the eligibility or ineligibility of any beneficiary whose right to receive benefits from the Trusts has been challenged by an Officer of the International, District or Local Union or by any Employer. In the event that a beneficiary or beneficiaries shall be determined to be ineligible for health care or other benefits, the Trustees shall take prompt action to correct this situation.

(4) Within six months after the effective date of this Agreement, the Trustees shall conduct a comprehensive review of procedures for monitoring covered medical expenses and shall report to the contracting parties with respect to insuring an effective system of cost controls, especially regarding any fees charged by physicians, hospitals, clinics, pharmacists or others which appear to be excessive. The Trustees shall take such steps as they deem appropriate to improve such procedures, and shall report to the contracting parties on such activities regularly thereafter, at least annually.

(5) The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

They are also authorized and directed, after adequate notice and consultation with the Employers and Union, to

make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:

(a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder;

(b) to obtain determination letters from the Internal Revenue Service that the two Pension Trusts will each meet the requirements of Section 401 of the Internal Revenue Code and the Trusts thereunder will be exempt under Section 501(a) of such Code and that the two Benefit Trusts will be exempt under Section 501(c)(9) of such Code;

(c) to establish the deductibility for income tax purposes of any and all contributions made by the signatory operators to the Pension Trusts and Benefit Trusts as paid or incurred; or

(d) to comply with all applicable court or government decisions or rulings.

SUMMARY OF PRINCIPAL PROVISIONS, UMWA HEALTH AND RETIREMENT BENEFITS

(1) PENSIONS FOR MINERS WHO ARE ALREADY RETIRED:

Formerly at $150 per month, these pensions are to be increased according to the following schedules:

(a) For retired miners who receive state or federal black lung benefits, an immediate increase to $200 per month, with a second increase one year after the effective date of this Agreement to $215 per month, and a third increase two years after the effective date of this Agreement to $225 per month.

(b) For retired miners who do not receive state or federal black lung benefits, an immediate increase to $200 per month, with a second increase one year after the effective date of this Agreement to $225 per month,

and a third increase two years after the effective date of this Agreement to $250 per month.

Any pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage.

(2) PENSIONS FOR MINERS WHO RETIRE AFTER THE EFFECTIVE DATE OF THIS AGREEMENT BUT PRIOR TO JANUARY 1, 1976:

A working miner who retires after the effective date of this Agreement but prior to January 1, 1976 and who is eligible for a pension will receive the same benefit levels as set forth in paragraph (1).

(3) PENSIONS FOR MINERS WHO RETIRE IN 1976:

A working miner who retires at any time in 1976 and who is eligible for a pension under the terms of this Agreement will receive pension benefits based upon an entirely new plan which provides credit for all years worked. Full credit is provided for years worked in mines of signatory Employers; partial credit is provided for years worked in mines of non-signatory Employers.

The earliest retirement age under this Plan will be 55. A miner may retire at 55 with 10 or more years of signatory employment.

Pension credits under the new plan are increased as a miner accumulates more years of employment. Benefits are also increased based upon a miner's age at the time of retirement with maximum benefits payable to miners who retire at the age of 62 or more.

In the first year of this pension plan (1976), the maximum credits are as follows:

- $12 per month multiplied by the years of signatory employment for the first 10 years of employment.
- $12.50 per month multiplied by the years of sig-

natory employment for the second 10 years of employment.

- $13 per month multiplied by the years of signatory employment for the third 10 years of employment.
- $13.50 per month multiplied by the years of signatory employment for each year over 30 years of employment.

To estimate your pension under the terms of this new Plan, see the table on page ——.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50 per cent of his pension until her death and will retain a Health Services card until her death or remarriage.

As a hedge against the anticipated increase in the cost of living, miners who retire under the new Plan during 1976 will receive a $10 per month increase in 1977.

(4) PENSIONS FOR MINERS WHO RETIRE IN 1977:

Benefits under the new Plan will be increased for miners retiring in 1977. Subject to the same terms as paragraph (3), the maximum benefit schedule applicable in 1977 will be as follows:

- $12.50 per month multiplied by the years of signatory employment for the first 10 years of employment.
- $13 per month multiplied by the years of signatory employment for the second 10 years of employment.
- $13.50 per month multiplied by the years of signatory employment for the third 10 years of employment.
- $14 per month multiplied by the years of signatory employment for each year over 30 years of employment.

If you retire in 1977, estimate your pension by referring to the table on page ——.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50 per cent of his pension until her death and will retain a Health Services card until her death or remarriage.

(5) PENSIONS FOR DISABLED MINERS:

A miner who becomes permanently and totally disabled as the result of a mine accident after the effective date of this Agreement will become eligible for pension benefits according to the following schedule:

(a) If a miner has less than ten years of signatory employment at the time of his disabling accident, he will receive a $125-month pension for life, and will retain his Health Services card for life.

(b) If a miner has ten years or more of signatory employment at the time of his disabling accident, he will receive an increased pension based upon the years of credited employment which he has accumulated at the time of his disabling accident. If the disabling accident occurs after the effective date of this Agreement but prior to January 1, 1976, the initial pension payment will be $125 per month, but such amount will, effective January 1, 1976, be increased to the pension levels at age 62 shown in the table on page 51. If the disabling accident occurs on or after January 1, 1976, the initial pension levels at age 62 shown on page 51 will apply immediately. (For example, a miner disabled during this period of time who is age 44 and has 22 years of employment, would be eligible effective January 1, 1976 for a disability pension of $271 per month).

If the disabling accident occurs in 1977, the higher schedule of benefits shown in the table on page 51 will apply. (In this case, the example Employee would receive $282 per month.)

(c) A miner who was permanently and totally disabled as the result of a mine accident after May 29, 1946, but prior to the effective date of this Agreement in a then signatory mine, will be eligible, upon application and

certification of disability, for a pension of $125 per month for the rest of his life, and will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

(6) PENSIONS FOR WIDOWS:

The new Plan provides, for the first time, for widows' pensions. Benefits will ordinarily be payable according to the following schedule:

(a) If a miner working on or after January 1, 1976, becomes eligible for a pension at any time thereafter, his widow will be entitled to receive a Surviving Spouse pension equal to 50 per cent of his pension until her death; she will retain a Health Services card until her death or remarriage.

(b) If, on or after January 1, 1976, a working miner dies (regardless of cause) and would have been eligible for an immediate pension had he retired on the date of his death, his widow will be eligible for a pension equal to 50 per cent of the pension he would have received, and will receive his pension until her death; she will retain a Health Services card until her death or remarriage.

(7) DEFERRED VESTED PENSION:

If a working miner terminates his employment for any reason after completing 10 years of signatory employment, and before age 55, he will be eligible to receive a pension at age 62, or an actuarially reduced pension at any time after 55. The widow's pension described in paragraph (6) does not apply to the widow of a miner receiving a deferred vested pension.

(8) BASIC DEATH BENEFITS:

Under the terms of this Agreement, basic death benefits are substantially increased, and will be payable according to the following schedule:

(a) Upon the death of a working miner with one to five dependents, a death benefit of $7,500 will be paid

to his widow or, in the absence of a widow, to his surviving dependents.

(b) Upon the death of a working miner with more than five dependents, a death benefit of $8,000 to $10,000 will be paid to his widow (or, in the absence of a widow, to his surviving dependents), based on an incremental payment of $500 per dependent.

(c) Upon the death of a working miner with no dependents, a death benefit of $2,000 will be paid to his nearest designated survivor, except that if the cause of death was any accident, the death benefit will be $7,500.

(d) Upon the death of a pensioned miner with dependents, a death benefit of $2,500 will be paid to his widow, or, in the absence of a widow, to his surviving dependents.

(e) Upon the death of a pensioned miner with no dependents, a death benefit of $2,000 will be paid to his nearest designated survivor.

(9) DEATH BENEFITS WHEN DEATH IS THE RESULT OF A MINE ACCIDENT:

If, after the effective date of this Agreement, a miner is killed in a mine accident, his widow will receive, in addition to the basic death benefit described above, a one-time cash payment of $10,000 plus $100 per month until her death or remarriage. These benefits will be in addition to any pension to which she may be entitled. In the event that there is no surviving spouse and there is one or more surviving dependent children, the above benefits will be payable to unmarried dependent childen until age 22.

(10) HEALTH SERVICES CARD:

Regulations already in effect governing eligibility for Health Services cards are amended to include the following:

(a) A miner who (1) has completed 20 years of credited service, including the required number of years of signatory service, (2) has not attained age 55, and (3)

is disabled and receiving Social Security disability insurance benefits will be eligible for a Health Services card.

(b) A working miner who becomes totally disabled due to a compensable disability within 4 years of the date he would be eligible for retirement shall be entitled to a Health Services card while so disabled and during the period for which Workmen's Compensation payments are applicable.

(c) The widow of a miner who retired and received a pension at any time on or after May 29, 1946, will receive, upon approval of application, a Health Services card until her death or remarriage.

(d) The widow of a miner who became permanently and totally disabled as the result of injuries suffered in a mine accident at any time on or after May 29, 1946, will, upon approval of application, receive a Health Services card until her death or remarriage.

(c) The widow of a miner who is currently receiving a pension, or a miner who receives a pension (other than a deferred vested pension based on less than 20 years of credited service) at any time after the effective date of this Agreement will upon his death retain a Health Services card until her death or remarriage.

(f) Disabled or retarded children of Health Services cardholders will be covered for life, so long as a surviving parent holds the card.

(11) HEALTH CARE:

All current programs administered by the UMWA Health and Retirement Funds will be carried forward and expanded as required to cover additional beneficiaries.

The foregoing summary is subject to the complete description of all benefits provided pursuant to this Agreement, which will be found in the Pension and Health Plans and Trusts adopted as part of this Agreement and incorporated herein by reference under the title "UMWA Health and Retirement Benefits." In case of conflict, the provisions of the Plans and Trusts shall be governing.

JOINT EXHIBIT 2

IMMEDIATE VESTING

AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN EFFECTIVE JANUARY 12, 1975

ARTICLE I—INTRODUCTION

Pursuant to the Collective Bargaining Agreement, the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN (hereinafter referred to as the "Plan"), provides pension benefits as hereinafter set forth. The provisions of the Plan are effective January 12, 1975, (the "effective date") and are set forth below.

It is the intention of the Employer, the Trustees, and the participants that the Plan be in complete compliance with the requirements and limitations set forth in the Internal Revenue Code and the Labor Law. Accordingly, all of the terms and conditions of the Pension Reform Act, by regulation or ruling, promulgated in compliance therewith by the Secretary of Treasury or prescribed in compliance therewith by the Secretary of Labor, are hereby incorporated into and made a part of this Plan. In the event of ambiguity or doubt as to the meaning of a word, paragraph or article hereof, or other interpretation of this Plan, the meaning and interpretation provided in said Act shall be used. This Plan shall be construed, applied and administered as to be in compliance, at all times, with the terms of the Pension Reform Act.

A. Definitions.

(1) "Collective Bargaining Agreement" means the Collective Bargaining Agreement between AMAX COAL COMPANY and LOCAL UNION NO. 1854 of the United Mine Workers of America for the Belle Ayr Mine, dated

———————, 1975, and any amendments thereto or renewals thereof.

(2) "Employer" means AMAX COAL COMPANY and any successor of said corporation. A successor Employer shall be subject to the provisions of the Pension Reform Act as to said Act's requirements concerning years of service with a predecessor Employer, participation, vesting, funding and other similar provisions.

(3) "Participant" means any individual employed by Employer in the appropriate bargaining unit certified in NLRB Case No. 27-RC-4914 and on whose behalf contributions have been made to this Plan by the Employer pursuant to the Collective Bargaining Agreement and the Pension Trust, and any other individual entitled to receive pension benefits under the Plan.

(4) "Pension Trust" means the trust established pursuant to the Collective Bargaining Agreement to fund this Plan.

(5) "Trustees" means the Trustees of the Pension Trust, who shall be named fiduciaries pursuant to the Pension Reform Act; provided, however, that the Pension Trust may be amended to designate other or additional named fiduciaries under said Trust and the Plan.

(6) "Credited Service" means the years of service which are accumulated and maintained for participants in accordance with Article IV and includes related Credit Service performed for Employers signatory to a plan that is recognized as a related plan by the Trustees of this and the related plan for the purposes of determining eligibility for and payment of pro rata pensions.

(7) "Related Service" means work performed for employers who are signatory to a plan that is recognized as a "related plan" by the Trustees of this and the related plan for the purposes of determining eligibility for and the payment of pro rata pensions.

B. When Retirement Occurs.

For the purposes of this Plan, in the case of any participant, retirement shall be considered to occur on the last day of credited service, provided that on such day he was eligible for an immediate or deferred pension under this Plan.

ARTICLE II—ELIGIBILITY

A. Age 55 Retirement.

Any participant who (a) has at least one (1) year of credited service, and (b) has attained the age of fifty-five (55) years (but not the age of sixty-two (62)) prior to retirement shall be eligible to retire on or after January 12, 1975, and shall upon his retirement (hereinafter "Age 55 Retirement") be eligible for a pension.

B. Age 62 Retirement.

Any participant who (a) has at least one (1) year of credited service, and (b) has attained the age of sixty-two (62) years prior to retirement, shall be eligible to retire on or after January 12, 1975, and shall upon his retirement (hereinafter "Age 62 Retirement") be eligible for a pension. Age sixty-two (62) shall be considered the normal rtirement age for purposes of the Pension Reform Act.

C. Disability Retirement.

Any participant who becomes totally disabled on or after the effective date as the result of a mine accident shall, upon his retirement (hereinafter "Disability Retirement"), be eligible for a pension. A participant shall be considered to be totally disabled only if by reason of such accident he is subsequently determined to be eligible for Social Scurity Disability Insurance Benefits under Title II of the Social Security Act or its successor.

D. Deferred Vested Retirement.

Any participant not eligible to receive a pension under any other provision of this Article II whose employment with the Employer is terminated after January 12, 1975, for any reason and who at the time of retirement has at least one (1) year of credited service shall be eligible for a pension (hereinafter "Deferred Vested Pension"), upon attaining age sixty-two (62), or, at the election of the participant, he shall be eligible for a reduced pension beginning at any time after he attains age fifty-five (55). At the time of such termination, such participant shall be given an appropriate written notice of his eligibility and other relevant data.

E. Nonduplication.

A participant shall be entitled to receive a pension under only one of the foregoing paragraphs of this Article II with respect to any retirement.

F. Employment for Vesting Purposes.

For all purposes of this Article II, years of employment shall be computed by giving credit for one year of employment for any year for which the participant completed 1,000 hours of employment; provided that (a) all years of employment before age twenty-two (22) shall be disregarded, (b) all years of employment before January 1, 1971, shall be disregarded unless the participant completed at least three (3) years of employment after December 31, 1970, and (c) years of employment prior to any break in service shall be disregarded to the maximum extent permissible under Section 203(b)(3) of the Employee Retirement Income Security Act of 1974. The provisions of this paragraph shall be interpreted and construed in accordance with the requirements of the Pension Reform Act and the regulations issued thereunder.

Years of service for an employer who is a party to a Reciprocal Agreement to which the Trustees of this Plan

are signatory on behalf of this Plan may be counted as related credited service, see Reciprocal Agreement, if any.

ARTICLE III—AMOUNT OF PENSION

A. Retirement in 1975-1976.

A pension granted to a participant who retires on and after January 12, 1975, but prior to January 1, 1977 pursuant to Article II shall consist of a pension amount payable in monthly installments provided in accordance with the provisions of this Article III as set forth below.

(1) *Age 55 Retirement Pension.*

(a) a deferred pension, commencing after attainment of age sixty-two (62), computed under the provisions of Subsection A(2), below; or, at the election of the participant, (b) an immediate pension, equal to the deferred pension to which he would have been eligible under (a) above had he so elected, reduced by ¼ of one percent (.025%) for each full month (three percent (3%) per year), between the date on which pension benefits began and the date on which participant attains age sixty-two (62).

(2) *Age 62 Retirement Pension.*

The amount of pension for Age 62 Retirement or Disability Retirement, subject to a minimum pension of $125.00 per month for Disability Retirement, shall be determined as follows:

(a) for each of the first ten (10) years of credited service, $13.00 per month;

(b) for each year of credited service in excess of ten (10) years, but not to exceed twenty (20) years, $13.50 per month;

(c) for each year of credited service in excess of twenty (20) years, but not to exceed thirty (30) years, $14.00 per month;

(d) for each year of credited service in excess of thirty (30) years, $14.50 per month.

Proportional credit shall be allowed for any fractional years of credited service pursuant to Article IV hereof.

(3) *Deferred Vested Pension.*

The amount of a deferred vested pension shall be a pension, commencing on or after attainment of age sixty-two (62), computed under the provisions of Subsection A(2), above, or, at the participant's election, between ages fifty-five (55) and sixty-two (62) with the pension payable reduced to its actuarial equivalent pursuant to Appendix A.

B. Retirement in 1977 or Thereafter.

A pension granted to a participant who retires on or after January 1, 1977, pursuant to Article II shall consist of a pension amount payable in monthly installments provided in accordance with the provisions of this Article III as set forth below.

(1) *Age 55 Retirement Pension.*

(a) a deferred pension, commencing after attainment of age sixty-two (62), computed under the provisions of Subsection B(2), below, or, at the election of the participant, (b) an immediate pension, equal to the deferred pension to which he would have been eligible under (a) above had he so elected, reduced by ¼ of one percent (.025%) for each full month (three percent (3%) per year) between the date on which pension benefits began and the date on which the participant attains age sixty-two (62).

(2) *Age 62 Retirement and Disability Retirement Pension.*

The amount of pension for Age 62 Retirement or Disability Retirement, subject to a minimum pension of $125.00 per month for Disability Retirement, shall be determined as follows:

(a) for each of the first ten (10) years of credited service, $13.50 per month;

(b) for each year of credited service in excess of ten (10) years, but not to exceed twenty (20) years, $14.00 per month; (c) for each year of credited service in excess of twenty (20) years, but not to exceed thirty (30) years, $14.50 per month;

(d) for each year of credited service in excess of thirty (30) years, $15.00 per month.

Proportional credit shall be allowed for any fractional years of credited service pursuant to Article IV hereof.

(3) *Deferred Vested Pension.*

The amount of a deferred vested pension shall be a pension, commencing on or after age sixty-two (62), computed under the provisions of Subsection B(2), above, or, at the participant's election, between ages fifty-five (55) and sixty-two (62) with the pension payable reduced to its actuarial equivalent pursuant to Appendix A.

C. Increased Pension.

Effective as of January 1, 1977, the pension of any participant who retired under this Plan on or after January 12, 1975, and whose pension was computed under the provisions of Subsection A(1) and Subsection A(2) of this Article III shall be increased by $10.00 per month. This increase will not be applicable to those participants who are eligible for either a Disability Retirement Pen-

sion or who become eligible to receive a Deferred Vested Pension.

D. *Commencement, Suspension and Termination of Pensions.*

Payments of pensions shall be subject to the following:

(1) The first payment on any pension shall be made for the month following the month in which the participant becomes eligible for a pension in accordance with Article II.

(2) The last payment to the pensioner shall be for the month in which the pensioner dies, but see the Widow's Benefit.

(3) Pension payments shall be payable on the first day of each month at the pensioner's last address of record.

(4) Any participant who continues to be employed by the Employer after his retirement shall not be entitled to receive pension benefits under this Plan until such time as he is no longer employed by the Employer.

(5) Years of service with other employers who are signatory to a Reciprocal Agreement to which this Plan is a party may be counted, under some circumstances, as credited service under this Plan; however, the amount of pension payable under this Plan shall be subject to the terms and conditions of the Reciprocal Agreement and under no circumstances shall this Plan be obligated to pay more than the pro rata pension due the participant under the Reciprocal Agreement.

ARTICLE IV—CREDITED SERVICE

A. *Credited Service.*

Subject to the limitations in paragraph B of this Article IV, credited service is a period during which the participant meets the requirements of subparagraphs (1), (2), or (3), below.

(1) A participant shall receive credit for a year of service for any year in which he worked as an employee either (a) at the Belle Ayr Mine of the AMAX COAL COMPANY for Employer, or, (b) in related service, and for at least 1,000 hours of service, with credit given for the next lowest ¼ years in the event any employee works less than 1,000 hours of service as follows:

750-999 hours, ¾ year
500-749 hours, ½ year
250-499 hours, ¼
249 hours or less, 0

It is recognized that it may be difficult to establish with certainty the credited service of a participant in the employment referred to above. In making the necessary determinations as to credited service, the Trustees may, in their absolute discretion, consider and rely upon any relevant and material evidence, including without limitation any or all of the following:

(a) A statement from the Administrator of a related plan certifying to the receipt of employer reports with respect to hours worked by the participant and stating the number of hours reported for the period covered by the statement.

(b) A statement from an employer certifying that the participant performed work for such employer entitling him to credited service during such period if such employer was known or reputed to be operating in the coal mining industry and was a signatory employer to the Related Plan.

(c) A statement from the secretary or other authorized officer of a local union of the United Mine Workers of America certifying that the participant was a member in good standing in such Union during such period.

(d) A W-2 form or check stub furnished for work performed during the period for any employer known

or reputed to have been operating in the coal mining industry and was a signatory employer to the Related Plan.

(e) A statement from the Social Security Administration to the effect that according to its records the participant was employed during the period by a named employer, which employer was known or reputed to be operating in the coal mining industry and was a signatory employer to the Related Plan.

(2) A participant shall receive credit for a year of service for any year in which he received state workmen's compensation payments pursuant to an award as a result of an occupational disease or injury sustained in the mine; provided, in the case of said occupational disease or injury, the participant had been so employed by the Employer in the Belle Ayr Mine for at least three (3) consecutive calendar years prior (but not necessarily immediately prior to) the disability or injury. Credit shall be given up to a maximum of four (4) years service credit from date of injury, or from the date of last employment in case of occupational disease provided the participant did not work regularly during the compensable period.

(3) A participant shall receive credit for a year of service for any year in which he served in the military service of the United States in any war, national emergency, or international police action, immediately following regular employment with Employer in the Belle Ayr Mine; provided, that credit for such service shall be limited to the original period of enlistment or obligated military service; and, provided, further, that the participant returned to work with Employer at the Belle Ayr Mine within twelve (12) months after his date of separation from the military service, unless he was precluded from doing so by service connected sickness, accident, or other disability, and returns to work for Employer at the Belle Ayr Mine when no longer precluded

by such disability. Service credit for the period of military service shall be computed in the same manner as described in paragraph (1), above.

B. *Additional Rules Concerning Credited Service.*

(1) A participant shall not be credited with more than one year of service for any calendar year by reason of any combination of the rules of this Article IV.

(2) Except as provided in Article V, service credits shall not be accrued subsequent to the effective date of pension payments.

(3) In the case of any participant, the last day of credited service shall be the last day on which the participant works as an employee for Employer at the Belle Ayr Mine, unless such participant continues to accrue credited service during the period for which he receives weekly sickness and accident benefits pursuant to the Collective Bargaining Agreement, in which case the last day of credited service shall be the last day of sickness and accident benefits are paid.

ARTICLE V—REEMPLOYMENT AFTER ATTAINMENT OF PENSION ELIGIBILITY

A. Any participant who has been retired and receiving a pension under this Plan and who shall be reemployed by an Employer shall, for the purpose of calculating any subsequent pension benefits to which he may become entitled, upon his subsequent retirement, be granted a pension equal to the sum of the pension he was previously receiving plus the excess of (i) over (ii) where (i) is the pension to which such participant would be entitled at the time of such retirement, based upon all years of credited service under the Plan and (ii) is the pension to which such participant would be entitled at the time of such retirement, based solely on his credited service at the time of his previous retirement.

B. Any participant eligible for a deferred vested pension under this Plan who shall be reemployed by the Employer prior to the commencement of pension benefits shall, for the purpose of calculating any subsequent pension benefits to which he may become entitled, be granted his credited service applicable to the deferred vested pension plus his credited service accrued after such reemployment.

ARTICLE VI—SURVIVING SPOUSE BENEFIT

A. (1) Except as provided in paragraph B., and subject to the requirements of the Pension Reform Act, there is hereby provided a Surviving Spouse Benefit for any participant who (a) has retired and is receiving a pension under this Plan, except a participant receiving a deferred vested pension who has not completed at least ten (10) years of credited service, (b) has not retired, but, at the date of his death, otherwise has met the eligibility requirements for an immediate pension under Article IIA., B., C., or D. under this Plan, and (c) is over age fifty-five (55) with at least ten (10) years of credited service and who has retired and is entitled to elect an immediate pension under Article IIA. or IIE. at the date of his death.

(2) The amount of such benefit shall be equal to fifty percent (50%) of the amount of the participant's pension at the time of his death or, in the event the participant dies after age fifty-five (55) at a time when he was eligible to elect a pension or to retire and receive a pension under Article II, but prior to his receipt of a pension, fifty percent (50%) of the amount of the pension he would have received if he had elected a pension or retired and become entitled to a pension as of the date immediately preceding the date of his death.

(3) The Surviving Spouse Benefit will not be effective unless the participant and his spouse have been married throughout the nine (9) month period ending on the date

of the participant's death or unless such nine (9) month requirement would be waived for purposes of determining entitlement to widow's insurance benefits under the Social Security Act.

(4) Payment to an eligible spouse will commence as of the first of the month following the month in which the participant's death occurs and the final payment shall be made for the month in which the spouse's death occurs.

B. (1) Any participant who is not employed by the Employer at the Belle Ayr Mine on the Effective date is not covered for a Surviving Spouse Benefit under this Article unless (a) he obtains at least three (3) years of credited service after the effective date, (b) he had ceased to be employed by the Employer as a result of (i) layoff, (ii) nonoccupational disability or accident, or (iii) occupational injury for which he was receiving workmen's compensation, or (c) he dies at a time when he is employed by the Employer at the Belle Ayr Mine.

ARTICLE VII—JOINT AND SURVIVOR ANNUITIES

Notwithstanding any other provision of this Plan, if a participant qualifies for a pension under this Plan, but is not covered for a surviving spouse benefit, the pension benefit otherwise provided to such participant shall be reduced actuarially pursuant to Appendix B and fifty percent (50%) of such reduced pension benefit will be continued, after the death of the participant, for the life of any qualified surviving spouse; provided, however, that such participant shall have a reasonable period before the starting date of his pension benefit to elect not to take a joint and survivor annuity as provided for in this Article and instead to receive a pension benefit for his life only which shall be computed pursuant to Appendix A and shall be the actuarial equivalent of the joint and survivor annuity computed under Appendix B. Prior to the exercise of an election under this paragraph, the participant must be provided with a written explanation of

the terms and conditions of the joint and survivor annuity and the effect of an election not to receive such annuity. In the event a participant elects not to receive a joint and survivor annuity, such election shall not become effective if the participant dies within a period of two (2) years beginning on the date of such election. A qualified surviving spouse shall be any spouse who has been married to the participant for at least nine (9) months prior to his death, unless such nine (9) month requirement would be waived for purposes of determining entitlement to widow's insurance benefits under the Social Security Act.

In the event that a participant who was subject to this Article and who was entitled to elect to receive a pension benefit shall die prior to receipt of a pension, his qualified surviving spouse shall be entitled to receive a survivor's benefit in the form of an annuity for life in an amount equal to fifty percent (50%) of the pension benefit the decedent would have received if he had elected to receive a pension beginning on the date immediately preceding the date of death.

Payment to a qualified surviving spouse under this Article will commence as of the first of the month following the month in which the participant's death occurs and the final payment shall be made for the month in which the spouse's death occurs.

ARTICLE VIII—MISCELLANEOUS

A. Determination of Eligibility.

The Trustees or such other named fiduciaries as may be properly designated shall have full and final determination as to all issues concerning eligibility for benefits.

B. General.

(1) The Trustees are authorized to promulgate rules and regulations to implement this Plan, and those rules and regulations shall be binding upon all persons dealing

with and participants claiming benefits under this Plan.

(2) No benefit payable under this Plan shall be subject in any way to alienation, sale, transfer, assignment, pledge, attachment, garnishment, execution, or encumbrance of any kind, and any attempt to accomplish the same shall be void.

(3) This Plan may be amended pursuant to the provisions of the Collective Bargaining Agreement or may be terminated during the life of the Collective Bargaining Agreement by agreement of the parties thereto; provided, however, that:

(a) this Plan shall not be amended or terminated in such manner as would cause or permit any part of the assets in the Pension Trust to be diverted to purposes other than the exclusive benefit of the participants and their beneficiaries, and

(b) this Plan shall not be amended to deny to a participant retroactively any benefits to which he was entitled under this Plan, unless such amendment is necessary to conform this Plan to, or to satisfy the conditions of any law, governmental regulations or ruling.

(4) Upon the termination of this Plan of the complete discontinuance of contributions to the Pension Trust, this Plan shall remain in force and effect for the period necessary to complete the payment of benefits in accordance with the terms of this Plan to the extent assets in the Pension Trust are available to pay such benefits.

(5) Forfeitures arising from the operation of the Plan shall not be used to increase the benefits which otherwise would be received under this Plan.

(6) Any participant or beneficiary whose claim for benefits under this Plan has been denied shall be (a) provided with adequate notice in writing setting forth the specific reasons for such denial, which notice shall be written in a manner calculated to be understood by the

participant, and, (b) afforded a reasonable opportunity for a full and fair review of the decision denying the claim by an appropriate named fiduciary or a person properly designated to carry out such responsibiilty.

(7) The Trustees are hereby authorized to allocate fiduciary responsibilities in any manner permitted pursuant to Section 405(c) of the Employee Retirement Income Security Act of 1974.

(8) Contributions to the Pension Trust to fund the benefits under this Plan shall be paid solely by the Employer in accordance with the greater of:

(a) a contribution rate by Employer of an amount, based on actuarial calculations, sufficient to provide for current service benefits and to amortize any unfunded past service liabilities over a period not to exceed thirty (30) years, or

(b) a contribution rate required under Section 412 of the Code to satisfy the minimum funding requirements.

And, provided, however, that Employer contributions hereunder shall in no event exceed the limitations on benefits and contributions set forth in Section 415 of the Code for pension plans.

All actuarial calculations shall be made by an enrolled actuary as provided in the Employee Retirement Income Security Act of 1974 and all calculations shall be in conformity with said Act.

Contribution by the Employer in compliance with this paragraph (8) shall be in complete and full discharge of Employer's obligations under this Plan and the Pension Trust and the Employer shall not be liable to any employee, participant, beneficiary of a participant or bargaining representative of any such employee or participant for contribution or additional contributions.

ARTICLE IX—PAYMENTS OF BENEFITS UPON EARLY TERMINATION OF PLAN

Notwithstanding any provisions of this Plan to the contrary, during the period described below, the benefits provided by the Employer's contributions for "restricted participants" who are those participants whose annual benefit provided by such contributions will exceed ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500), but applicable only to the twenty-five (25) highest paid employees as of the time of establishment of the Plan (including any such high paid employees who are not participants at that time, but may later become participants) shall be subject to the conditions set forth below. These conditions shall continue for a period of ten (10) years following the date of establishment of the Plan, and if at the end of ten (10) years the full current costs under the Plan have not been funded, these conditions shall continue until the full current costs are funded for the first time.

(1) Certain benefits (hereinafter called "unrestricted benefits") shall be paid to a restricted participant in full which have been provided by the Employer's contributions not exceeding the larger of the following amounts:

(a) TWENTY THOUSAND DOLLARS ($20,000); or

(b) An amount equal to twenty percent (20%) of the first FIFTY THOUSAND DOLLARS ($50,000) of the participant's average regular annual compensation multiplied by the number of years between the date of establishment of the Plan and whichever of the following dates shall be applicable:

(i) the date of termination of the Plan if the Plan is terminated within ten (10) years from the date of its establishment, or the date of the failure to meet full current costs if earlier;

(ii) in the case of a restricted participant described in this Article for whom such benefits become payable within ten (10) years after the date of establishment of the Plan, the date benefits become payable under the Plan, or the date of the failure to meet full current costs if earlier; or

(iii) in the case of a restricted participant described in this Article for whom benefits become payable under the Plan after the Plan has been in effect ten (10) years if the current costs of the Plan for the first ten (10) years have not been funded, the date of the failure to meet full current costs.

(2) If the Plan is terminated or the full current costs thereof have not been met at any time within ten (10) years after the establishment of the Plan, the benefits which any of the restricted participants described in this Article may receive from the Employer's contributions shall not exceed the benefit set forth in (1), above, and if at the end of ten (10) years from the date of establishment of the Plan the full current costs have not been met, the benefits which any of such participants may receive from the Employer's contributions shall not exceed the benefit set forth in (1), above, until the full current costs are funded for the first time.

(3) If a restricted participant described in this Article leaves the employ of the Employer or withdraws from participation hereunder when the full current costs have been met, the benefits which he may receive from the Employer's contributions shall not exceed the benefits set forth in (1), above, until the Plan has been in force for ten (10) years from the date of its establishment and the full current costs have been funded.

(4) These conditions shall not restrict the full payment of any insurance, death, or survivor's benefits on

behalf of a participant who dies while the Plan is in full effect and its full current costs have been met.

(5) These conditions shall not restrict the current payment of full retirement benefits for any retired restricted participant described in this Article in the form of level amounts of annuity not greater than the level annuity under the basic form of benefit provided in the Plan, while the Plan is in full effect and its current costs have been met.

(6) In the event of termination of this Plan within the period described in the second sentence of this Article, any excess benefits purchased by the Employer's contributions for restricted participants described in this Article shall be reduced to cash and distributed to unretired participants other than those restricted by this Article in the same proportion as the total contributions theretofore made for their benefits hereunder.

In the event that the Employer's Plan shall be changed so as to increase substantially the extent of possible discrimination as to contributions and as to benefits actually payable in the event of the subsequent termination of the Plan or the subsequent discontinuance of contributions thereunder, then the provisions of this Article IX shall be applied to the Plan as so changed as if it were a new Plan established on the date of such change. However, the provision in Section (1) permitting payment in full of benefits based on at least TWENTY THOUSAND DOLLARS ($20,000) shall be applicable to the aggregate amount contributed by the Employer on behalf of the participant from the date of establishment of the original Plan, and, for purposes of determining if the participant's anticipated annual pension exceeds ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500), both the Employer contributions on the participant's behalf prior to the date of the change in the Plan and those expected to be made on his behalf subsequent to the date of change (based on his rate of compensation on the date of the change) are to be taken into account.

In the case of any increase in benefits under the Plan, those unrestricted benefits to be paid to a restricted participant in full shall thereafter be determined in the following manner.

Such benefits shall be paid in full which have been provided by the Employer's contributions not exceeding the larger of the following amounts:

(a) the Employer's contributions (or funds attributable thereto) which would have been applied to provide the benefits for the participant if the Plan had been continued without change as it existed prior to the effective date of the change; or

(b) TWENTY THOUSAND DOLLARS ($20,000); or

(c) the sum of:

(i) Employer funds (or funds attributable thereto) which would have been applied to provide benefits for the participant if the Plan had not been changed, but had been terminated the day before the effective date of the change; and

(ii) An amount equal to twenty percent (20%) of the first FIFTY THOUSAND DOLLARS ($50,000) of the participant's average regular annual compensation multiplied by the number of years between the effective date of the change and whichever of the following dates shall be applicable:

1. the date of termination of the Plan if the Plan is terminated within ten (10) years from the date of the change, or the date of the failure to meet full current costs if earlier;

2. in the case of a restricted participant described in this Article for whom such benefits become payable with ten (10) years

after the effective date of the change, the date benefits become payable under the Plan as changed, or the date of failure to meet full current costs if earlier; or

3. in the case of a restricted participant described in this Article for whom benefits become payable under the Plan as changed after the Plan as changed has been in effect for ten (10) years if the current costs of the Plan as changed for the first ten (10) years from the effective date of the change have not been funded, the date of the failure to meet full current costs.

ARTICLE X—SIGNATURES

This instrument shall be construed, regulated and administered under the laws of the State of ————————

IN WITNESS WHEREOF, each of the parties signatory hereto, pursuant to proper authority, has caused this instrument, effective January 12, 1975, to be signed by its proper officers, or representatives this ——— day of ————————, 1975.

Attest:

————————————

[SEAL]

EMPLOYER
AMAX COAL COMPANY

By: ————————————

Its: ————————————

TRUSTEES
COLORADO NATIONAL BANK

By: ————————————

Trust Officer

————————————

APPENDIX A

Actuarial Equivalence Factors for Deferred Vested Retirement Benefits Commencing Prior to Age 62

The following factors are to be multiplied by the full accrued benefit payable commencing at normal retirement age 62 to yield the equivalent benefit payable commencing at the indicated age:

AGE		Actuarial Equivalence	AGE		Actuarial Equivalence
Yrs.	Mos.	Factor	Yrs.	Mos.	Factor

APPENDIX B

Table of Percentages To Be Applied Against Pension Payable to Participant Under Joint and Survivor Annuities

Age of Spouse	Age of Participant							
	55	56	57	58	59	60	61	62
	%	%	%	%	%	%	%	%

Pension payable to Surviving Spouse will be equal to 50% of the Participant's Pension as reduced in accordance with the above table.

Company Proposal
December 8, 1975

Article IV Wages and Hours

Section (c) Mines Which Operate Six Days or Less Each Week

(8) No coal will be loaded from the pit on Sunday; except, in recognition of the special circumstances at the Belle Ayr Mine, the Employer shall be permitted to load coal from the pit on Sunday and to utilize such crews as are necessary in order to obtain maximum advantage from available transportation equipment. Nothing in this section shall be construed to prohibit processing and loading previously mined coal for shipment on any day, including Sundays and holidays, providing that employees engaged in such loading shall be covered by this Agreement and be paid at the applicable rate for work performed on Sundays and holidays.

For the Company _____

For the Union _____

Date _____

Company Proposal
December 8, 1975

Article IX—Regular Vacation

Section (b) Dates of Regular Vacation

(5) In order to facilitate continuing operations for the Employer and maximum vacation opportunities for Employees during summer months the Employer shall have the option to schedule two (2) or more vacation periods during the months of June, July and August wherein Employees may be scheduled for regular vacation and all mining and processing activities may continue. The Employer must make a written declaration setting forth the dates for such vacation periods at the mine and shall file a copy of this declaration with the President of the UMWA District in which the mine is located by May 15.

(6) It is understood that for the duration of this Agreement, if agreed to between the Employer and the Employee, each Employee covered by this Agreement shall have the option of accepting pay in lieu of taking regular vacation for the qualifying period in which he was employed.

For the Company _____

For the Union _____

Date _____

JOINT EXHIBIT 2

UNITED MINE WORKERS OF AMERICA

[SEAL]

UNITED MINE WORKERS' BUILDING
900 Fifteenth Street, N.W.
Washington, D.C. 20005
November 14, 1975

Mr. Elkins Payne
AMAX Coal Company
105 South Meridian Street
Indianapolis, IN 46225

Dear Mr. Elkins:

Please find enclosed a copy of the UMWA's latest proposal for an agreement to cover the Belle Ayr mine. Because of the need to meet as early as possible at the negotiating table, we have not duplicated proposals on which we do not intend to move and have forwarded only new proposals. In the interest of simplicity, we have consistently referred to substantive items in terms of their position in our last package, although as we have stated repeatedly, we are more than willing to make reasonable alterations in our traditional format.

To expedite your appraisal of this material, the attached explanation delineates each and every change we have made and gives the reasons for each. In some major areas, we have indicated the reasons why we cannot accede to suggestions which you have made. In other areas where we feel we might reach agreement, but where the responsibility for making a proposal is clearly incumbent upon you, we have expressed our willingness to consider seriously your suggestions if they are reduced to writing.

Without question, our new package makes substantial concessions and proposes serious compromises, many of which affect contractual protections which have existed

in UMWA agreements for years. I am sure that when you have assessed the impact of these changes, there can be no question of either our good faith or our strong desire to reach accord. By the same token, we will scrutinize closely AMAX's responses to determine whether or not there is any serious desire on your part to reach agreement with the UMWA. I have asked Richard Trumka to contact you immediately to set up a meeting to explain our proposals. However, if, in the interim, you need further information, please feel free to contact him or me.

Very truly yours,

/s/ Mike Trbovich
MIKE TRBOVICH

Enclosure

Attachment

EXPLANATION OF THE NOVEMBER 14, 1975 PROPOSALS OF THE UNITED MINE WORKERS OF AMERICA FOR AN AGREEMENT AT THE BELLE AYR MINE.

ARTICLE I—ENABLING CLAUSE

In its latest proposal, the United Mine Workers of America has agreed to the concept that the proposed Agreement should pertain to the Belle Ayr mine only. However, the Union feels very strongly that the Belle Ayr mine comprises any mining which will be done on the present leases held by AMAX in Campbell County, Wyoming. Therefore, the language of Article I has been restructured to insure that although the Agreement will apply only to the Belle Ayr mine, the UMWA will obtain jurisdiction of all new operations on those leases.

The International Union has withdrawn its proposal that all district agreements previously executed be carried forward in the new Agreement.

Although the UMWA is confident of the legality of the successorship clause, the Union understands the strong objections of Amax to the concept of successorship and has withdrawn its proposal in the interest of reaching agreement.

ARTICLE II—SCOPE AND COVERAGE

The UMWA has deleted all references to transportation by waterway in Article II, Section (a) since the Belle Ayr mine does not transport coal by water. At our last negotiating session, AMAX expressed the desire to define "processing" of coal to exclude on-site gasification or liquefaction. The UMWA is willing to consider seriously any proposal which AMAX makes in this regard.

Article II, Section (b) of the Union's former proposal has been amended to delete specific references to supervisory personnel which are not used at the Belle Ayr mine and specific references to limitations on the number

of legitimate supervisory personnel which the company may employ.

Article II, Section (f), *Application of this Contract to the Employers Coal Lands*, to which AMAX took strong objection has been deleted in its entirety.

Article II, Section (g) (2) has been amended to indicate that subcontracted work shall be performed specifically under UMWA standards.

The Union has adopted AMAX's proposal on construction work and incorporated it into Article II, Section (h) of its proposal:

ARTICLE III—HEALTH AND SAFETY

In Article III, Section (c) (1), the UMWA has incorporated the substance of its previously proposed Memorandum of Understanding on the training of health and safety committeemen. This change was made to accommodate AMAX's feeling that there should be no Memorandum of Understanding appended to the Agreement. After careful consideration, the UMWA decided not to proopse an examination for Mine Health and Safety Committeemen for several reasons. First, the choice of a Mine Health and Safety Committee is clearly a Union function in which management should have minimal participation. Second, our Constitution provides that any working miner may be a safety committeeman and that safety committeemen are to be chosen on the basis of local union choice without limitation. It is our opinion that to agree in the contract to allow the imposition of stringent restrictions upon that choice would violate Title IV of the Labor Management and Reporting Disclosure Act. Third, we think it is highly unlikely that the Employer and the Union will each be able to agree to the contents of an examination for Mine Health and Safety Committeemen. Fourth, even if they should agree, the possibility that those chosen as committeemen might fail could result in less than an adequate number of com-

mitteemen to represent the local union at any given time.

Article III, Section (c) (3) has been amended to include the substance of the Memorandum of Understanding included with our last proposal requiring that where possible imminent danger recommendations be reduced to writing. The UMWA cannot, however, agree to any infringement upon the right of the Health and Safety Committee to require the removal of affected persons from imminently dangerous areas of the mine. This should not, however, pose any substantial practical problem to the operation of the mine since it is our understanding that since the mine opened, not one imminent danger recommendation has been made by the Committee.

Although the Union has highly qualified personnel, fully capable of advising AMAX on mining plans, in the interest of compromise, the UMWA has abandoned its insistence on the inclusion of Article III, Section (b) requiring UMWA participation in the development of mining plans in any new Agreement.

The language of Article III, Section (1), *Safety Equipment and Protective Clothing Allowance*, has been amended to incorporate the suggestion of AMAX that the word "section" be substituted for the word "Agreement" in the last sentence as a protection against overpayments under this section. It is our understanding that in light of this substitution, AMAX will be willing to include electrical cap lamps in the safety equipment required to be provided by the Employer without charge.

In Article III, Section (n), the UMWA has accepted AMAX's suggestion that all sections relating to safety be incorporated in Article III, and the UMWA has adopted AMAX's proposal on Section (n), of March 14, 1975, with the following exceptions:

—The Union's original demand was that no Employee with less than ninety (90) days experience be required to work alone. AMAX's proposal was that this limitation be restricted only to "hazardous" areas. The UMWA has

attempted to compromise this difference by indicating its willingness to delineate the specific areas of the Belle Ayr mine which are not "hazardous" and incorporating them into Section (n) (1).

—In Section (n) (16), the Union has incorporated its previously proposed Memorandum of Understanding so that the section contains an explicit definition of the term "injury" and a procedure for resolving conflicts between the Employer and Employee regarding what injuries require removal from the mine.

—The Union had originally proposed that only pumper, engineers, etc. be required to "protect" the Employer's property. AMAX countered with a proposal that "Employees necessary" be required to protect the Employer's property and to refrain from suspending work. In Section (n) (17) the Union proposes to define specifically those Employees necessary to protect the Employer's property at the Belle Ayr mine.

—The UMWA has dropped its proposals originally contained in Article III, Section (n), paragraphs (1) and (5). These provided respectively that the Employer design, build and maintain coal waste impoundments and water impoundments in accord with safe and sound engineering practices; and that no Employee be required to lift more weight than he or she is capable of lifting.

ARTICLE IV—WAGES AND HOURS

As suggested, the UMWA's proposal on Article IV, Section (c) (6), has been amended to require that idle day work, premium time and overtime shall be shared within classification.

The Union has adopted AMAX's proposal on the processing of coal on Sundays and holidays which is now incorporated in Article IV, Section (c) (8) of our package.

The UMWA has added to Article IV, Section (c) (9) which specifically prohibits the use of swing crews on six day operations. This is a precautionary measure since

we do not understand AMAX to have used such crews in the past or to intend to use them in the future.

Article IV. Section (d) has been amended to require fifteen (15) days notice of a change in schedule instead of thirty (30). This is an effort to compromise on AMAX's demand for only five (5) days notice. In the second paragraph of Article IV, Section (d), the UMWA has adopted AMAX's broad language allowing the company to terminate a seven-day schedule at the mine for business reasons, force majuere, etc. Article IV, Section (d) (1) has been amended in line with AMAX's suggestion to require that idle day work as well as overtime and premium time be equally shared, and that each be shared within classification.

ARTICLE VIII—ALLOWANCES

The UMWA accepts AMAX's proposal on pay for military duty now incorporated in Section (d) of Article VIII, and although the Union feels strongly that a retroactivity allowance is fully justified the Union is dropping this demand in an effort to facilitate agreement.

ARTICLE XI—HOLIDAYS

During negotiations AMAX expressed concern that Employees designating another holiday in lieu of a holiday occurring during scheduled vacation would be paid more than triple time. The Union in Article XI, Section (f), has amended its proposal to foreclose such a possibility.

At our last meeting, AMAX indicated its willingness to pay regularly scheduled overtime as part of an Employee's birthday holiday. Article XI, Section (g) of the Union's proposal has been modified accordingly.

ARTICLE XII—REGULAR VACATION

The UMWA had initially suggested in conjunction with the adoption of Article XII, Section (b) (1) that

the Employee have the unilateral right to accept pay in lieu of his regular vacation for the year 1975. At our last meeting, AMAX objected and suggested that pay in lieu of regular vacation be a matter of mutual agreement. Our proposal has been adjusted accordingly.

At our last meeting, AMAX generally suggested but did not propose a regular vacation plan under which one-half the work force would take its vacation in June and one-half the work force would take its vacation in July. The Union feels that it is incumbent upon AMAX to make any formal proposal in this vein and will give any such plan serious consideration.

ARTICLE IV—CHECKOFF

At our last meeting, AMAX expressed reservations about checking off for the Credit Union and other voluntary deductions. The Union feels that both items are legitimate subjects of a checkoff, but in the interest of compromise has proposed to relieve the Employer of its obligation to checkoff "other voluntary deductions" where such a checkoff is not practicable. The Union has also incorporated into the body of its proposal the clear recognition that only when presented with written assignments is the Employer required to make checkoff deductions. In our opinion, this should dispel any problems which AMAX's attorneys feel ensue from the obligation of the company to "aid and assist" the Union, in checkoff matters. The proposal has also been modified by substituting the word "Employer" for "Employers" where appropriate.

ARTICLE XV—TRAINING

AMAX has made no proposal for representatives to assist in implementing training programs. At our last meeting, AMAX advanced several reasons for this decision. First, AMAX felt that this section should be lim-

ited specifically to training at the Belle Ayr mine. Second, AMAX was of the opinion that training is primarily an Employer responsibility. The Union has attempted to meet these objections by restructing the language of Article XV, Section (a) to make it clear that the training representatives provided for will function only in regard to the Belle Ayr mine and will function merely in an advisory fashion without infringing upon management's rights.

ARTICLE XVI—SENIORITY

The UMWA has incorporated the procedure for a reduction in force proposed by AMAX into the body of the Agreement. However, several changes should be noted. Throughout the section the words "presently able to do the work of the job" have been substituted for the term "qualification" to comport with the definition of seniority in Article XVI, Section (a); and the words "laid off" have been substituted for the word "terminated" to make it clear that laid off Employees have reemployment rights at the mine. Our notes reflect that AMAX has no quarrel with either concept, although it does object to Employees having reemployment rights at AMAX mines other than Belle Ayr.

In Article XVI, Section (e), the UMWA has amended its proposal to require the Employer to provide the Union panel custodian with an updated seniority list on a monthly basis. This suggestion made by the Union in the last negotiating session is calculated to minimize any problems which AMAX might otherwise experience with the accuracy of the records kept by Union panel custodians at the Belle Ayr mine. The section has also been amended to comport with the new time limits established by Section (g).

In Article XVI, Section (g) the UMWA has established definite time limits within which a panel member must respond to notification of the availability of a job

and within which he must return to work. These changes were made to correspond to suggestions advanced by AMAX at our last negotiating session.

In line with AMAX's suggestion at our last meeting, in Article XVI, Section (i) (1), the International Union has reverted to its original proposal which requires posting of job bids at customary bulletin boards rather than at portals.

The UMWA has incorporated into Article XVI a new section—(o)—which sets out our previously made proposal on the subject of strikers' reemployment rights at the Belle Ayr mine. The incorporation of this provision in the body of the Agreement was made to comply with AMAX's desire that there be no Memoranda of Understanding on substantive issues relating to the contract.

The UMWA has dropped its proposal for a Western conference to be sponsored by AMAX which was originally included in our proposed Memorandum of Understanding, but we do not withdraw our proposal that all litigation generated by the dispute at the Belle Ayr mine be dismissed.

ARTICLE XIX—SPECIAL RULES

AMAX has consistently rejected the concept that manning requirements for mining equipment should be included in the contract. Although the UMWA strongly disagrees, in an effort to reach agreement, we have withdrawn our proposals for manning contained in Article XVI, Section (b) (1). We have, however, maintained our position that, for safety reasons, a helper should be maintained on overburden drills, and we do not believe it is unreasonable to require the duties of oilers and groundmen to be spelled out in the contract.

ARTICLE XX—MISCELLANEOUS

Our records reflect some confusion over the question of our original proposal in Article XX, Section (g) per-

taining to house rent. Our position in this matter could be best clarified if AMAX would inform us in writing of the extent of any interest it has in coal miners' housing in the general area from which Belle Ayr's miners are drawn.

ARTICLE XXIV—DISTRICT AGREEMENTS

The UMWA has modified its proposal in Article XXIV, Section (b) to reflect AMAX's objection to reference to District Agreements.

ARTICLE XXVI—SEVERABILITY CLAUSE

In line with AMAX's original proposal, the United Mine Workers of America has modified Article XXVI so that if any provision of the Agreement is declared invalid all other provisions shall remain in full force and effect.

ARTICLE XXV—MAINTAIN INTEGRITY OF CONTRACT AND RESORT TO COURTS

Article XXV has been modified to relect the International Union's withdrawal of its proposal on successorship.

ARTICLE I

ENABLING CAUSE

THIS AGREEMENT is made this ——— day of ———, 19——, between the AMAX Coal Company; as party of the first part (hereinafter called "Employer") and the International Union, United Mine Workers of America (hereinafter called "Union"), on behalf of Local Union 1854 and each member thereof, as party of the second part. This Agreement covers its BELLE AYR mine and all other western surface sub-bituminous coal and lignite mines, coal lands, coal producing and coal preparation facilities, owned or operated, or held under lease by it, or by any subsidiary or affiliate at the date of this Agreement, or which may hereinafter (during the term of this Agreement) be put into production or use on the leases attached hereto as Addendum A.

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the Employees of the party of the first part employed at the Belle Ayr Mine, pursuant to a certification of representation issued by the National Labor Relations Board Case No. 27-RC-4914. It is further agreed that as a condition of employment all Employees at said western surface mines shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this Agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the par-

ties hereto that this Agreement will promote and improve industrial and economic relationships in the said western surface mines and to set forth herein the basic Agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons covered by this Agreement. Management will not abridge the rights of the Employees as set forth in this Agreement.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE II

SCOPE AND COVERAGE

Section (a) Work Jurisdiction

The following work shall be performed solely by Employees represented by the United Mine Workers of America and is covered by this Agreement:

(1) Production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal;

(2) Transportation of coal in and around the mine and to a screening, crushing, washing or other preparation faciilty, or other mine-related operation (except by rail not owned by Employer);

(3) Repair and maintenance work normally performed at the mine site or at a central shop of the Employer and maintenance of mine roads; and

(4) Work customarily releated to all of the above.

Contracting, subcontracting, leasing and subleasing and construction work, as defined herein, will be conducted in accordance with the provisions of this Article.

Nothing in this Section will be construed to diminish the jurisdiction, express or implied, of the United Mine Workers.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE II

SCOPE AND COVERAGE

Section (b) *Exemptions Clause*

It is the intention of this Agreement to serve to the Employer and except from this Agreement an adequate force of supervisory Employees to effectively conduct the safe and efficient operation of the mines.

Coal samplers, weigh masters, watchmen, clerks, engineering and technical forces of the Employer, working at or from a district or local mine office are exempt from this Agreement.

All other employees working in or about the mines shall be included in this Agreement except essential Supervisors in charge of any class of labor inside or outside of the mines and who by the terms of Section (c) of this Article are forbidden from performing any work as defined in Section (a) of this Article.

The union will not seek to organize or ask recognition for such excepted supervisory Employees during the life of this contract.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE II

SCOPE AND COVERAGE

Section (g) *Contracting and Subcontracting*

The Employer may contract out or subcontract the following work:

(1) The transportation of coal from the mine site to a noncontiguous facility,

(2) Repair and maintenance work customarily performed by classified Employees at the mine or at a central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty, or (b) where the Employer does not have available equipment or regular Employees with necessary skills available to perform the work at the mine or central shop, provided, however, that the work shall be performed under UMWA standards;

(3) Mine reclamation work such as discing, seeding, and such other processes which occur after rough grading work (rough grading for reclamation shall not be contracted out).

For the Union

November 14, 1975

Date

For the Employer

ARTICLE II

SCOPE AND COVERAGE

Section (h) *Construction Work*

All construction of mine or mine-related facilities including theerection of mine tipples at the mine covered by this Agreement, which is not performed by the Employer, may be performed by such outside contractors as are designated by the Employer, and such work will be under the jurisdiction of the United Mine Workers of America in as far as is economically reasonable in a manner and to the extent permitted by law.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE III

HEALTH AND SAFETY

Section (c) *Mine Health and Safety Committee*

(1) At each mine there shall be a Mine Health and Safety Committee made up of miners employed at the mine who are qualified by mining experience or training and selected by the local union. The local union shall inform the Employer of the names of the Committee members. Committee members shall participate in a training program to be established pursuant to Article III, Section (c) (2). It is understood that a Mine Health and Safety Committee member who fails or refuses to participate in a training program which has been established and conducted pursuant to Article III, Section (c) (2) may be removed from the Committee upon thirty (30) days notice in writing to the local union by the Employer. The Committee at all times shall be deemed to be acting within the scope of their employment in the mine within the meaning of the applicable workmen's compensation law.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE III

HEALTH AND SAFETY

Section (c) *Mine Health and Safety Committee*

(3) The Mine Health and Safety Committee may inspect any portion of a mine and surface installations, dams or waste impoundments and gob piles connected therewith. If the Committee believes conditions found endanger the lives and bodies of the Employees, it shall report its findings and recommendations to the Employer. In those special instances where the Committee believes that an imminent danger exists and the Committee recommends that the Employer remove all Employees from the involved area, the Employer is required to follow the Committee's recommendation and remove the Employees from the involved area immediately. It is understood that except in unusual circumstances, the Committee's recommendations shall be made to the Employer in writing. In those unusual circumstances when such recommendations are not reduced to writing before presentation to the Employer, they shall be reduced to writing and delivered to the Employer promptly thereafter.

The Mine Health and Safety Committee shall, when engaged in its official duties as herein provided, be furnished transportation at the mine.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE III

HEALTH AND SAFETY

Section (1) *Safety Equipment and Protective Clothing Allowance*

Safety equipment and devices, including electric cap lamps, where used, personal ear plugs, prescription safety glasses or exclusive of eye examination costs, nonprescription safety glasses or goggles, shall be furnished by the Employer without charge. Hip boots or waders shall be kept by the Employer at the mine and issued for use on the job as unusual circumstances warrant. The Employee shall use and take reasonable care of equipment provided by the Employer. The Employer shall not be required to provide personal wearing apparel such as clothing, shoes, boots where worn as part of normal footwear, hats, belts, and gloves. Instead of supplying such personal wearing apparel, the Employer shall pay each Employee an annual protective clothing allowance. The protective clothing allowance will be $100 annually. This allowance will be paid to the Employee on the first payday following his employment if he remains actively employed on that date and on each employment anniversary date thereafter, if on his employment anniversary date he remains actively employed. It is the intention of the parties that each Employee covered by this Section shall receive three $100 payments (less any payments made after November 12, 1974, and prior to the effective date of this Agreement) during the term of this Agreement, and that such payments be made at the earliest practicable date following the Employee's employment date or anniversary thereof commencing November 12, 1974.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE III

HEALTH AND SAFETY

Section (n) *Special Safety Problem Areas*

To provide a specific contractual solution to safety problems which regularly occur and to insure uniform health and safety practices, the parties agree as follows:

(1) A new and inexperienced Employee with less than ninety (90) days experience in surface mining shall not be required to work alone in any areas where he cannot be seen or his cries for help heard except ———— ————, (The UMWA is willing to discuss specific exceptions for areas which are clearly not hazardous).

(2) Repairs on electrical components or circuits supplying power to any device or equipment located at a surface mine shall be done by qualified UMWA electricians except to the extent that such work may be performed by others under the provisions of Article II (Scope and Coverage). When an Employee believes that proper tests have not been made on electrical components or circuits to ensure their safe operation, or that an electrical circuit is not in compliance with applicable state or federal laws or regulations, the operator must comply with the Employee's request that the condition complained of be examined by a qualified person as defined above. No Employee raising a question regarding the safety of electrical circuits or components shall be subject to discipline or discrimination.

(3) All excavation machinery 65 yards and larger in size shall be equipped with intercom units or another no less effective communication device.

(4) All trucks operating on or around the mine property shall be equipped with at least two back-up mirrors, one located on each side of the truck, convenient for the operator's use.

(5) All machinery equipped with internal combustion engines shall have the exhaust system installed so as to minimize the Employee's exposure to fumes.

(6) When necessary to allay dust on haulage roadways and in the pit area, the road shall be watered or some other means used to allay the dust when needed. In the winter months when freezing may occur effective means shall be used to alleviate slippery conditions on such roadways.

(7) All entrances to blasting areas shall be guarded to prevent unauthorized access during blasting. Blasting activities shall be performed in accordance with applicable federal and state laws and regulations which are incorporated herein by reference.

(8) Whenever a haulage truck crosses a public road, safeguards will be taken to assure safe crossing.

(9) When an Employer transports coal from its tipple or other loading point by its train to another of its loading or dumping points, a classified Employee shall be assigned as a brakeman, switchman, or trip rider to assure safe operation.

(10) All haulage roads on mine property shall be maintained in safe and serviceable condition.

(11) The Employer shall provide an ample supply of potable drinking water to all Employees at all times when they are working and shall be responsible for assuring that water containers are kept clean.

(12) All cabs of vehicles and heavy machinery shall be adequately heated and ventilated to assure reasonable comfortable working conditions in all seasons.

(13) The Employer shall provide sanitary ventilated toilets for the use of Employees at the jobsite and shall be responsible for keeping those facilities clean.

(14) The Employer shall maintain at each mine a thoroughly equipped first-aid station and make appropriate arrangements for a doctor or nurse to be on call on short notice in cases of emergencies.

(15) The Employer shall provide a safe, quick and efficient means of transporting injured Employees from any section of the mine to nearby medical facilities.

(16) When an Employee is injured during his shift, he shall be promptly removed from the mine and paid for the complete shift. When an Employee becomes sick during his shift, and leaves because he cannot perform his work he shall be paid until he reaches the parking area. An injury requiring removal under these provisions must be of such a nature as to prevent the Employee from performing his duties, or of such nature as to seriously endanger his health. The initial determination that one or both of these circumstances exists is the Employee's prerogative and the Employer must, immediately upon request, remove a man who claims injury from the mine. This duty on the Employer's part, however, in no way impairs the Employer's right to challenge the Employee's right to pay for the shift during which he is removed. A conflict between the Employee and the Employer in this regard is to be settled through the grievance procedure.

(17) When required by the Employer, ————, ————, ———— and ———— shall perform their classified duties to protect the Employer's property and shall under no conditions suspend work but shall at all times protect all the Employer's property under their care. They shall perform all work necessary to protect the Employer's property. (The UMWA is willing to discuss the specific classifications which under normal circumstances would be necessary to protect the Employer's property).

(18) The Employer shall prohibit cutting, welding, or burning where adequate ventilation does not exist to remove the contaminated air.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE IV

WAGES AND HOURS

Introduction

Nothing in this Agreement, unless stated in this Article or except Article VII, Section (c), Reporting Pay, shall be construed as a guarantee of hours of work per day or per week. Employees required to work overtime shall be paid in accordance with the appropriate provisions of this Article.

Section (a) *Basic Work Week*

The basic work week shall begin at 12:01 a.m., Monday.

Section (b) *Basic Work Day*

The Employee's regular starting time shall be the time that he is scheduled to arrive at his designated work place. The Employee's regular quitting time shall be the time he is scheduled to depart from his designated work place.

Under the terms of this Agreement, an Employer may elect to operate its mine on either of the following schedules, provided that the daily wage rates established in Appendix A. Part I, are paid to Employees at mines who work a regularly scheduled seven and one-quarter (7.25) hours and that the daily wage rates established in Appendix A, Part II, are paid to Employees at mines who work a regularly scheduled eight (8) hour day:

(1) Seven and One-Quarter (7.25) Hour Day

When an Employer elects to operate its mine on shifts of seven and one-quarter (7.25) hours, the work day of seven and one-quarter (7.25) hours includes a staggered thirty (30) minutes for lunch and no suspension of operations throughout the day. Coal may be mined, processed and loaded for shipment on any one or more of these shifts with different crews. These seven and one-

quarter (7.25) hours shall be paid at straight time daily and hourly rates as provided in Appendix A, Part I. Overtime beyond seven and one-quarter (7.25) hours per day and thirty-six and one-quarter (36.25) hours per week shall, except as provided in Section (e), be paid for at time and one-half, with no pyramiding of overtime.

When an Employer elects to operate its mine on shifts of seven and one-quarter (7.25) hours, coal may not be loaded from the pit beyond seven and one-quarter (7.25) hours during each shift; provided, however, that where an Employer elects to operate on shifts of seven and one-quarter (7.25) hours, the regular work day of Employees engaged in the transportation, dumping, handling and preparation of coal; loading of coal for shipment; the operation of powerhouses, substations and pumps; and, those Employees operating stripping shovels, draglines, overburden drills, shooting and other overburden removal operations may be extended to eight (8) hours, but shall be paid in accordance with Appendix A, Part II, of this Agreement and Section (b) (2) hereof.

(2) Eight (8) Hour Day

When an Employer elects to operate its mine on shifts of eight (8) hour, the work day of eight (8) hours includes a staggered thirty (30) minutes for lunch and no suspension of operations throughout the day. Coal may be mined, processed and loaded for shipment on any one or more of these shifts with different crews. These eight (8) hours shall be paid at straight time daily and hourly rates as provided in Appendix A, Part II. Overtime beyond eight (8) hours per day and forty (40) hours per week shall be paid for at time and one-half except as provided in Section (e), with no pyramiding of overtime. When an Employer elects to so operate its mine on shifts of eight (8) hours, all Employees scheduled to work shall be scheduled for eight (8) hour shifts, and the Employer may so operate for the entire eight (8) hour period each shift or shifts.

Section (c) *Mines Which Operate Six Days or Less in Each Week*

At mines which mine and process coal (6) days or less during any week, the following rules shall apply:

(1) Work on the seventh consecutive day and holidays is optional for the Employee, but nothing in this Section (c) (1) shall be construed to require the Employer to guarantee work on the seventh consecutive day or holidays. No Employee shall be disciplined or discriminated against for exercising his right to refuse optional work.

(2) All employees, including those listed in paragraph (3) of this section, shall be given a fair and equal opportunity to work the same number of days per week as the number of days on which coal is loaded from the pit, and shall be given equal opportunity to share the available work on premium days. Laying off individual Employees during the week for the purpose of denying them work as stated in this Section (c) (2) is prohibited.

(3) The Employer shall have the right to schedule maintenance crews, powerhouse and subsection employees, pumpers, bathhouse men, firemen, switchboard operators and other similar employees for Saturday and Sunday work and schedule their day(s) off during the first five (5) days of the work week.

(4) Except in cases of emergency, all Employees required to perform idle day work on Saturday will be notified by the preceding Thursday. The Employer shall post a list of the Employee required to perform idle day work on Saturday before the end of the day shift on the Thursday prior to the Saturday on which such work is required.

(5) An Employee called to work on idle days at a rate less than his regular classified rate may decline to perform that work at lower rates on idle days.

(6) Opportunity for overtime, idle day work, and premium time must be equally shared within classification in accordance with past practice and custom. An idle day

work roster must be kept up to date and posted at each mine for the purpose of distributing idle day work on an equitable basis to the extent practicable. The Employer shall also insure that all overtime, idle day and premium time worked shall be equally shared within each classification to the extent practicable.

(7) The Employer shall have the right to schedule stripping shovels, draglines, overburden drills, shooting and other overburden removal operations on a continuous seven (7) day basis. The Employer shall establish a swing shift for such continuing seven (7) day operations. The regular crew shall be assured of at least six (6) scheduled days work each week except during weeks in which holidays occur; or, in circumstances beyond the control of the Employer, such as, but not limited to, transportation disruptions, abnormal wheather conditions, major equipment or facility failures, power failures and work stoppages.

(8) No coal will be loaded from the pit on Sunday. Nothing in this section shall be construed to prohibit processing and loading previously mined coal for shipment on any day including Sundays and holidays, provided that Employees engage in such loading and processing for shipment shall be covered by this agreement and be paid at the applicable rate for work performed on Sundays and holidays.

(9) There shall be no swing crews for classifications regularly scheduled to work six (6) days or less each week.

Section (d) *Mines Which Operate Seven (7) Days Each Week*

An Employer may elect to operate its mine, and to mine, process and load coal for shipment on each of seven (7) days. Coal may be mined, processed and loaded for shipment on any one or more shifts each day with different crews. If the Employer elects to mine, process and load coal for shipment on Sunday it shall give at least fifteen (15) days notice to its Employees.

The Employer may elect to suspend the seven (7) day operating schedule and/or revert to the six (6) day or less operating schedule for bona fide business reasons; force majeure situations; and, circumstances beyond the control of the Employer including but not limited to transportation disruptions, customer-related problems and major equipment or facility failures.

When an Employer operates on a schedule of seven (7) days each week, the following conditions shall be observed:

(1) For such seven (7) day operations, the Employer shall insure that opportunity for overtime, idle day, and premium time work are equally shared within each classification in accordance with past practice and custom. The Employer shall assure Employees of at least six (6) scheduled days work each week except weeks in which holidays occur; or in circumstances beyond the control of the Employer including but not limited to abnormal weather conditions, transportation disruptions, power failures, work stoppages and major equipment or facility failures.

(2) A swing shift relief shall be established for each clasification which is regularly scheduled for seven (7) days a week. An earnest effort will be made to schedule the swing Employee or Employees to work on the same shift each day, but Employees assigned to swing shift relief shall work on variable shifts, as required, to safely and efficiently relieve the regular crews.

It is not the intent of this provision to authorize introduction of shift rotation where it has not been practiced as a part of a system for seven-day operation. When a plan introduced by the Employer for seven (7) day operations does not satisfy the requirements of this Section, any Employee affected may file a grievance, and the arbitrator shall be authorized to direct the Employer to alter or amend its plan to comply with the requirements of this Section.

(3) Work of the Employee on the seventh consecutive day and holidays is optional, but nothing in this Section

(d) (3) shall be construed to require the Employer to guarantee work on the seventh consecutive day or holidays. No Employee shall be disciplined or discriminated against for exercising his right to refuse optional work.

(4) Work scheduled by the Employer beyond ten (10) hours on any day and fifty (50) hours in any week is optional for the Employee, but nothing in this Section (d) (4) shall be construed to require the Employer to guarantee hours of work. No Employee shall be disciplined or discriminated against for exercising his right to refuse optional work.

(5) Work shall be scheduled in all classifications covered by this Section (d) on each day in which coal is mined and processed except as provided in Section (d) (8) below.

(6) Employees on swing crews shall be paid at the rate required for the job on which they relieve.

(7) Opportunity for overtime and premium day work must be shared equally. A premium day work roster must be kept up to date and posted at each mine for the purpose of distributing premium days on an equitable basis to the extent practicabl.e The Employer shall insure that overtime and premium day work shall be equally shared within each classification to the extent practicable.

(8) An Employer shall not be required to schedule work for an Employee for more than six (6) days or six (6) shifts per week except in the equal division of optional work. Classification involving only intermittent utilization during the mining and processing cycle need not be scheduled for seven (7) days.

Section (e) *Saturday, Sunday and Premium Work*

Work performed on Saturday shall be paid at time and one-half or rate and one-half, except that double time or double rates shall be paid for all work in excess of seven and one-quarter hours, for Employees working a seven and one-quarter hour day, or in excess of eight

hours for eight-hour Employees. Work performed on Sunday shall be paid for at double time or double rates. Work performed on holidays shall be paid for at triple time or triple rates. There shall be no pyramiding of overtime.

Section (f) *Change of Shift Length or Days of Operation*

When an Employer changes the hours or days (that is, from six (6) days or less to seven (7) days or vice versa) of operation of its mine, it shall be required to use its best efforts to minimize the effects of such occurrence and to schedule work equally for all Employees to the extent practicable.

Section (g) *Standard Hourly and Daily Wage Rates*

The standard daily and hourly wage rate paid for work performed under this Agreement is set forth in Appendix A. Part I of Appendix A establishes the rates of pay for the various classifications based upon the standard seven and one-quarter (7.25) hour work day. Part II of Appendix A establishes the rates of pay for the various classifications where an eight (8) hour work day is established. The standard daily and hourly wage rate for each job classification shall be the standard daily and hourly wage rate for all job titles included in such classification as listed in Appendix B. The list of job titles within each classification indicates only the rates to be paid to Employee bearing such job titles. No Employer shall have authority to introduce into a mine any job title or any classification which has not been listed in Appendix B, unless ordered to do so by an arbitrator as set out in this section, or unless by mutual agreement between the parties.

Where an Employee believes that the duties which he is required to perform are appropriate to a job title and classification other than those which have been assigned to him, he may file and process a grievance under Article XXI (Settlement of Disputes) to be classified under

the proper job title. Should an arbitrator decide that the complaining Employee has been improperly classified, he shall order the Employer to properly classify him under the proper job title. If the new classification involves a higher rate, the Employer shall reimburse him for all wages he would have earned had he been properly classified, retroactive to the date he filed his grievance. The time limit for the filing of grievances imposed by Article XXI (Settlement of Disputes) shall not be applicable to this Section.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE VIII

ALLOWANCES

Section (d) *Military Duty*

When an Employee is called to active duty in the armed forces, the national guard or the reserves, including emergency call-ups and summer encampment training, he shall be excused from work. Upon proof of service and the amount of pay received therefor, the Employee is entitled to receive a maximum of two (2) weeks pay in any calendar year at his regular rate, including payment for any regularly scheduled overtime and premium pay, less any amounts received by the Employee from the armed services, the national guard or reserves for such period.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE VIII

ALLOWANCES

Section (e) *Personal or Sick Leave*

(1) During each calendar year of this Agreement, beginning with the year of 1975, each classified Employee with one year or more of classified service with his Employer shall become eligible for Personal or Sick Leave, at his regular rate for any five (5) working days on which the Employee is absent from work for reasons of sickness, accident, emergency, or personal business.

(2) Paid Personal or Sick Leave shall not be utilized for any period of less than one (1) full regular workday.

(3) To the extent practicable, the Employee shall notify his immediate supervisor at least twenty-four (24) hours in advance of the shift or shifts for which he will be unable to report. In the event of sudden sickness, accident, or emergency, the Employee shall make a reasonable effort to notify his immediate supervisor at least two (2) hours in advance of the shift on which he is scheduled to work.

(4) If, at the end of any calendar year, an Employee has not exhausted the paid Personal or Sick Leave for which he becomes eligible under this Section he shall receive pay in lieu of such leave at his regular rate, as provided in paragraph (1) above. His regular rate shall be the rate in effect at the end of such calendar year for the payroll period which includes the last workday of the calendar year.

(5) Personal or Sick Leave days shall not be counted as part of the seven (7) day waiting period under the sick and accident pay program unless the Employee is disabled as a result of sickness or accident so as to be prevented from performing his regular classified job and his disability is certified by a physician legally licensed to practice medicine.

(6) Any active Employee with less than one (1) year's standing as of January 1 of any year covered by this Agreement (beginning January 1, 1975) shall be entitled to one (1) day of Personal or Sick Leave for each fifty (50) days worked in the previous calendar year, but not to exceed five (5) days of such leave.

(7) If, at any time during the calendar year, an active Employee terminates his employment, he shall receive pay at his regular rate for all Personal and Sick Leave days to which he is entitled under paragraphs (1) and (6) of this section which he has not taken at the time of his termination. His regular rate shall be the rate in effect at the time of his termination. For example, an active Employee with more than one year of service who terminated his employment in July and who had used one day of his Personal and Sick Leave would be entitled to pay for four days at his regular rate. An active Employee with less than one year's standing who had worked 100 days in the previous calendar year who terminated his employment in July and who had used one day of his Personal or Sick Leave would be entitled to pay for one day at his regular rate.

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For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE XI

HOLIDAYS

Section (f) *Holidays Worked During Vacation Period*

When a holiday occurs during an Employee's scheduled vacation, he shall be paid for the holiday not worked in addition to his vacation pay and shall designate another day he wishes to take as a holiday. The parties agree that this section requires that a holiday which occurs during a scheduled vacation should be treated the same as any other holiday for all purposes. This means that when an Employee designates a day outside of his vacation period as a holiday and then chooses to work that day, he will be paid double time for working his regular shift on that day. Thus, having already been paid one shift at his regular rate for the holiday during vacation, he will be paid a total of triple time for having worked on the holiday designated.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE XI

HOLIDAYS

Section (g) *Birthday Holidays*

If the Employee's birthday occurs on a day when the mine or other facility at which he is employed works, the Employee has the option of taking his birthday off and receiving one shift of pay at his regular rate including regularly scheduled overtime, or he has the option of working on his birthday and receiving triple time for all time worked.

If the Employee's birthday falls on Saturday and the mine does not work, and he is not otherwise entitled to perform idle day work, he is entitled to his regular rate for the birthday holiday. If the Employee does work on his Saturday birthday, he is entitled to triple time, which is three times his straight-time rate, for all time worked.

If an Employee's birthday falls on February 29 or on any other scheduled holiday or during the vacation period or on a Saturday or Sunday, he may elect to designate another day to celebrate his birthday holiday.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE XII

REGULAR VACATION

Section (b) *Dates of Regular Vacation Period*

(1) Beginning at the start of the day shift on Saturday, June 28, 1975, and ending at the beginning of the day shift on Saturday, July 12, 1975; or beginning at the start of the day shift on Saturday, July 12, 1975, and ending at the beginning of the day shift on Saturday, July 26, 1975. It is understood that for the calendar year of 1975, by mutual agreement between the Employee and the Employer, each Employee covered by this Agreement shall have the option of accepting pay in lieu of taking the regular vacation. Each Employee shall advise the Employer whether he wishes to take his vacation or accept pay in lieu thereof, in writing, within fourteen (14) days of the effective date of this Agreement.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE XIV

CHECKOFF

During the term of this Agreement, the membership dues, including initiation fees, and assesments of the United Mine Workers of America and its various subdivisions, credit union, and except where not practicable, other voluntary deductions, as authorized and approved by the International Union, United Mine Workers of America, shall be checked off the wages of the Employees by the Employer covered by this contract and shall be remitted by the Employer to the properly designated officers of the Union for distribution to its various branches. Such remittances shall be accompanied by an itemized statement showing the name of each Employee, his Social Security Number, hours worked, and the amount checked off for dues, initiation fees, and assessments together with a list of Employees from whom dues, initiation fees and assessments have not been collected. In order that this section may become effective and operate within the limitations of the Labor-Management Relations Act, 1947, the Union hereby agrees to furnish, with all reasonable dispatch to the Employer, and the Employer agrees to assist and cooperate in obtaining written assignments from each Employee so employed. It is understood, however, that the Employer is not required or authorized to make checkoff deductions from an Employee's wages except upon presentation of a written assignment authorizing that deductions be made. Upon the presentation to the Employer of such assignments, in such reasonable form as time and circumstances, look-to be the continuous and uninterrupted production of coal, may allow, said Employer shall make deductions so authorized and delivered the same to the designated District

officer of the Union or to such authorized representative as may be designated by the Union.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE XV

TRAINING

Section (a) *Priority*

The parties agree that the establishment of effective training programs for Employees is essential to safe and efficient production of coal at the Belle Ayr mine. The International Union and AMAX shall each, therefore, assign a trained representative to assist the Employer in developing and implementing the various training programs at the Belle Ayr mine provided for herein. It is understood that the functions of these representatives shall be purely advisory.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE XVI

SENIORITY

Section (v) *Reduction in the Work Force*

In all cases where the working force is to be reduced, Employees with the greatest seniority at the time shall be retained provided that they have the ability to perform available work.

It is understood that the following procedure will be followed in connection with the implementation of reductions in work force under this Agreement:

In all cases where the working force is to be reduced, Employees with the greatest seniority shall be retained providing they have the ability to step in and perform the available work.

The following procedure shall be used to reduce the work force:

Step 1: Management shall determine the number of men with the least seniority to be reduced in each classification. These men shall be identified as displaced Employees.

Step 2: The men retained in classification as a result of Step 1 shall be reassigned by seniority to fill vacancies within the classification.

Step 3: Management shall prepare a listing, in order of seniority, of all displaced Employees. That list shall identify the qualifications of displaced Employees from their previous employment history and their employment history with their present Employer.

Step 4: List all retained Employees at the mine in seniority order identifying the Employee's classification and shift.

Step 5: The list of displaced Employees shall be compared with the list of retained Employees and the senior displaced Employee will be considered for the job held by the junior retained Employee.

(a) If the senior displaced Employee is presently able to step into and perform the work of the job, he will be assigned to the job of the junior retained Employee and the junior retained Employee's name shall be placed in proper seniority sequence on the displaced list. This process shall be repeated until the appropriate number of senior able men are placed back into the work force.

(b) If the senior displaced Employee is not presently able to step into and perform the work of the job of the junior retained Employee, he shall be considered for assignment to the job of the next junior retained Employee until the displaced Employee is assigned a job, or, he reaches a level of seniority in the retained group where greater seniority exists.

Step 6: Upon completion of Step 5 those Employees remaining on the displaced list will be laid off in a force reduction.

Vacancies created during force reduction procedures are not subject to Article XVI, Section (i), Job Bidding.

To insure a minimum disruption in mine operations, the District representative of the Union and the Mine Committee shall be notified by the Employer of a proposed reduction in working force promptly after such determination has been made. However, management shall complete the lists required by Steps 1, 2 and 3, as set forth above prior to the time of any group meetings

between it, the UMWA District representative, and the Mine Committee are convened for the purpose of discussing the reduction in work force.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE XVI

SENIORITY

Section (e) *Panel Custodians*

The superintendent of the mine and the Recording Secretary of the local union shall be joint custodians of the panel records. So that panel records are kept up to date, the Employer shall provide an updated seniority list for all active and laid-off Employees at the mine on a monthly basis. It shall be the obligation of the laid-off Employee to keep the custodians of all mine panels on which he is entitled to place his name informed of any change of address and/or telephone number where he may be regularly reached. Notice to the last known address of the laid-off Employee by certified mail shall be sufficient notice of recall. The Employee so notified may either accept or reject the job which is available; but if the Employee rejects a job which he has listed as one to which he wishes to be recalled or fails to respond as set out in Section (g), below, his name shall be removed from the panel at that mine.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE XVI

SENIORITY

Section (g) *Right to be Recalled*

Any person on the panel list who secures casual or intermittent employment during the period when no work is available for him at the operation shall in no way jeopardize his seniority rights while engaged in such temporary employment. Any panel member to be recalled to work shall be notified by the Employer of the specific vacancy by registered mail. The panel member shall respond by letter postmarked no later than fifteen (15) days from the postmarked date of the letter of notification of the job vacancy as to whether he accepts or rejects the job offered. If the panel member accepts the job vacancy, he must report to work no later than thirty (30) days from the postmarked date of notification of the job vacancy. If the affected panel member does not respond to the job offer or report to work within the time limits indicated, he shall lose his seniority rights at the operation and shall have his name removed from the panel list.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Union

ARTICLE XVI

SENIORITY

Section (i) *Job Bidding*

Filling of all permanent vacancies and new jobs created during the term of this Agreement will be made on the basis of mine seniority as set forth in the following procedure:

(1) The job or vacancy shall be posted by managements in a conspicuous place at customary bulletin boards of the mine for a period of seven (7) calendar days, but no less than five (5) production days, and will be properly identified as to job title, wage rate, and at nonrotating mines as to shift. If the new job or vacancy does not exist, the estimated date when the job or vacancy will exist will also be posted.

* * *

For the Union

November 14, 1975

Date

For the Employer

ARTICLE XVI

SENIORITY

Section (e) *Return to Work*

As a part of the consideration for the execution of the Agreement and this Memorandum of Understanding, all striking Employees whether employed by AMAX prior to January 12, 1975, or whether initially hired after January 12, 1975, shall be entitled to return to work, retaining their original seniority dates. As of the effective date of this Agreement, all jobs covered by the Agreement shall be deemed vacant and shall be filled in accordance with Article XVI, Section (i) Job Bidding.

_____

For the Union

November 14, 1975

_____

Date

_____

For the Employer

ARTICLE XIX

SPECIAL RULES

Section (b) *Manning of Certain Mining Equipment*

(1) *Duties of Oiler*

The oiler shall service the shovel or dragline to which he is assigned. Oilers servicing machines under 12 yards in size shall not be required to be within the swing of the boom. On other machines, the oiler will stay within the swing of the boom of the machine to which he is assigned except when performing duties customarily associated with his job at the machine. The regular classified oiler shall, as part of his duties, learn to perform the duties of the machine operator through an on-the-job break-in under the machine operator's guidance. After such break-in period, the oiler shall operate the dragline or shovel to periodically relieve the operator as directed by the Employer. When performing the operator's duties, the oiler shall be paid the operator's rate.

(2) *Duties of Groundman*

The groundman's duties shall include the following: knocking down the roll; steering the machine; leveling the machine; moving cable for the machine; and perform such other duties as are customarily associated with his job at the machine.

(3) *Overburden Drill Helper*

A drill helper shall be assigned to pneumatic drills drilling holes 6 inches or larger in diameter in overburden. The drill helper shall be at the drill to which he is assigned while the drill is in operation.

_____

For the Union

November 14, 1975

_____

Date

ARTICLE XXIV

DISTRICT AGREEMENTS

Section (b) *Prior Practice and Custom*

This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by references; and all local agreements, rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished. Except where abolished by mutual agreement of the parties, all prior practice and custom not in conflict with this Agreement shall be continued, but any provisions in local agreements providing for the levying, assessing or collection of fines or providing for "no-strike," "indemnity," or "guarantee" clauses or provisions are hereby expressly repealed and shall not be applicable during the term of this Agreement. Whenever a conflict arises between this Agreement and any District or local agreement, this Agreement shall prevail.

For the Union

November 14, 1975

Date

For the Employer

ARTICLE XXV

MAINTAIN INTEGRITY OF CONTRACT AND RESORT TO COURTS

The United Mine Workers of America and AMAX agree and affirm that, except as provided herein, they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" Article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract and by collective bargaining without recourse to the courts.

_____

For the Union

Date

November 14, 1975

_____

For the Employer

ARTICLE XXVI

SEVERABILITY CLAUSE

In the event any provision of this Agreement is declared invalid, all other provisions of this Agreement shall remain in full force and effect.

For the Union

November 14, 1975

Date

For the Employer

EMPLOYER BANK
EMPLOYER TRUSTEE
VERSION

AMAX COAL COMPANY BELLE AYR MINE PENSION TRUST AGREEMENT

Pursuant to the Collective Bargaining Agreement, there is hereby established a trust to be known as the "AMAX COAL COMPANY BELLE AYR MINE PENSION TRUST" (hereinafter referred to as "Pension Trust") for the purpose of making benefit payments pursuant to the provisions of the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN. The provisions of the Pension Trust are effective January 12, 1975, and are as set forth below.

ARTICLE I

The following terms shall have the meanings herein set forth:

(1) "Collective bargaining agreement" means collective bargaining agreement between AMAX Coal COMPANY and Local Union No. 1854 of the United Mine Workers of America for the Belle Ayr Mine dated ————, 1975, and any amendments thereto or renewals thereof.

(2) "Employer" means AMAX COAL COMPANY and any successor of said corporation. A successor Employer shall be subject to the provisions of the Pension Reform Act as to said Act's requirements concerning years of service with a predecessor Employer, participation, vesting, funding and other similar provisions.

(3) "Plan" shall refer to the "AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN" established pursuant to the Collective Bargaining Agreement.

(4) "Trustees" shall mean the trustees of this Trust designated in accordance with the provisions of Article II hereof, who shall be the named fiduciaries required pursuant to Section 402 of ERISA; provided, however, that this instrument may be amended pursuant to Artricle X hereof to designate other or additional named fiduciaries.

(5) "Pension Reform Act" means the provisions of the Internal Revenue Code of 1954, as amended, and the Labor Law, including the Employee Retirement Income Security Act of 1974 ("ERISA"), and including all interpretations of said Code, Law and Act, by regulations and rulings, promulgated or prescribed in compliance therewith by the Secretary of Treasury and the Secretary of Labor. References to the Code shall be deemed to refer to the Internal Revenue Code, the Labor Law and the Pension Reform Act as such laws may be subsequently modified, amended, replaced or amplified by any Federal statutes and regulations, rulings, or interpretations of similar application or import which are in compliance with the Code.

ARTICLE II

The Pension Trust shall be administered by a Board of two (2) Trustees appointed by the Employer. The Employer may remove any Trustee for cause or not.

In the event of resignation, death, removal, inability or unwillingness to serve of a Trustee, the Employer shall appoint a successor.

The Trustees shall be ——————("Individual Trustee") of —————— and the COLORADO NATIONAL BANK ("Bank Trustee"), having its principal office at 17th Street and Champa, Denver, Colorado 80202. Said Two Trustees so named and designated shall constitute the Board of Trustees to administer the the Pension Trust. The Bank Trustee is the custodian of the assets of the Pension Trust and is solely responsible

for investments and investment policy and the Individual Trustee is responsible for the administration of the Plan only.

It is agreed that the Trustees herein provided for, or their duly appointed successors, shall serve as long as the proper continuation and administration of said Trust shall require.

This Trust shall have its principal place of business at ————————————, or such other place as may be determined by the Trustees.

ARTICLE III

The Pension Trust established with the Trustees hereunder is an irrevocable trust which shall endure as long as the purposes for its creation shall exist. The Pension Trust consists of such sums of money and other property, acceptable to the Trustees, as from time to time shall be held by or paid or delivered to the Trustees and such earnings, profits, and increments thereon as may occur from time to time. All such money and other property delivered to the Bank Trustee, including Employer contributions, and all investments and reinvestments made therewith or proceeds thereof and all earnings and profits thereon, less the payment which at the time of reference shall have been made by the Trustees as authorizd herein, are referred to herein as the "assets of the Pension Trust". The assets of the Pension Trust shall be held by the Bank Trustee and be dealt with in accordance with the express provisions of this instrument and the requirements of law.

The moneys to be paid into the Pension Trust shall not in any maner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Pension Trust under the terms of this instrument.

ARTICLE IV

The Trustees, or such other persons as may be properly designated pursuant to Article IX hereof, are directed and authorized (a) as to the Bank Trustee, to hold, to investment and to reinvest the assets of the Pension Trust as provided herein; (b) to pay moneys from the Pension Trust in accordance with the terms of the Plan for the purpose of distributing the benefits payable under the Plan, and (c) to pay the cost of administration of the Pension Trust as hereinafter provided.

In exercising their powers and duties as provided in this Article IV and in other Articles hereof, the Trustees shall be subject to the Pension Reform Act, including specifically the Fiduciary Responsibility provided therein and under no circumstances shall the Trustees engage in any prohibited transaction as provided by Section 406 of ERISA and Section 4975 of the Code, and at all times, the Trustees shall conduct themselves and the business of the Pension Trust according to the requirements of the Pension Reform Act.

ARTICLE V

The Bank Trustee shall have full discretionary powers of management and control, of sale and resale, in fee simple or otherwise, mortgage, lease, and pledge, of the assets of the Pension Trust, and shall not be restricted to investments in securities or property of the character now or hereafter authorized by law or rules of the State of Colorado. The assets of the Pension Trust shall be invested and reinvested, without distinction between principal and income, in securities and other forms of property, including, but not limited to, real estate, corporate stocks (common and preferred), debentures, bonds and other obligations whether or not secured. The Bank Trustee shall not be limited to the amount or type of any investment in relation to the amount of type of invest-

ments constituting the Trust as a whole, except as provided by the Pension Reform Act.

The Trustees or such other persons as may be properly designated pursuant to Article IX hereof may, in their discretion, keep such portion of the assets of the Pension Trust in cash or cash balances as the Trustees may determine to be reasonably necessary to satisfy the current needs of the Trust.

ARTICLE VI

Neither by way of limitation nor in derogation, and in amplification of any powers granted herein, but in compliance with the delegation of custody and investment responsibility solely to the Bank Trustee and that the Individual Trustee shall be concerned with administration of the Plan, the Bank Trustee, the Trustees, or such other persons as may be properly designated pursuant to Article IX hereof, are further authorized:

(1) To purchase, sell, exchange, convey, transfer or dispose of, and also to grant options with respect to, any property, whether real or personal, at any time held by them and to make any sale, private or public;

(2) To retain, manage, operate, repair, improve, develop, preserve, mortgage or lease for any period any real property interests or rights held by the Trustees upon such terms and conditions as the Trustees deem proper, either alone or by joining with others, using other trust assets for any of such purposes if by them deemed advisable; to modify, extend, renew, or otherwise adjust any or all of the provisions of any such mortgage or lease, including the waiver of rentals, if by them deemed advisable;

(3) To compromise, compound and settle any debt or obligations due from third persons to them or to third persons from them, as Trustees hereunder, and to reduce the rate of interest on, to extend or otherwise modify, or to foreclose upon default or otherwise enforce, any such

obligations; (4) To vote in person or by proxy and to give general or special proxies or powers of attorney, with or without power of substitution, on any securities or other investments held by them;

(5) To exercise any rights or options appurtenant to any securities or other property held by them for the conversion thereof into other securities or property, or to exercise any rights or options held by them to subscribe for or purchase additional securities or other property, and to make any and all necessary payments with respect to any such conversion or exercise;

(6) To join in, dissent from or oppose, the reorganization, recapitalization, consolidation, sale or merger of corporations or properties of which they may hold stocks, bonds or other securities or in which they may be interested, upon such terms and conditions as they may deem wise; to pay any expenses, assessments or subscriptions in connection therewith and to accept any securities or property (whether or not the Trustees would be authorized to then invest in such securities or property) which may be issued upon any such reorganization, recapitalization, consolidation, sale or merger, and thereafter to hold the same;

(7) To make, execute, acknowledge and deliver any and all deeds, leases, mortgages, assignments, documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(8) To enforce any right, obligation or claim in their absolute discretion and in general to protect in any way the interest of the Trust, either before or after default with respect to any such right, obligation or claim, and, in case they shall consider such action for the best interest of the Trust, in their absolute discretion to abstain from the enforcement of any right, obligation or claim and to abandon any property, whether real or personal, which at any time may be held by them;

(9) To borrow or raise money (including borrowing from the Trustee Bank to the extent permitted by the Pension Reform Act) for the purpose of the Trust in such amount and upon such terms and conditions as in their absolute discretion they may deem advisable; and for any sums so borrowed to issue their promissory note as Trustees and to secure the repayment thereof by mortgaging or pledging all or any part of the Trust; and no person lending money to the Trustees shall be bound to see to the application of the money loaned or to inquire into the validity, expendiency or propriety of any such borrowing;

(10) To employ suitable agents and counsel from time to time, and to pay them reasonable expenses and compensation;

(11) To retain without liability for depreciation any securities or property at any time purchased and/or received by the Trustees as a part of the Trust;

(12) To purchase insurance for the Trustees (and other fiduciaries) or for the Pension Trust to cover liability or losses occurring by reason of the act or omission of a fiduciary in the case of a breach of a fiduciary obligation by such fiduciary. A Trustee (or other fiduciary) may purchase insurance to cover his liability or losses occurring by reason of his act or omission if purchased from and for his own account. The Employer may purchase insurance to cover potential liability of one or more persons who serve in a duciary capacity with regard to the Pension Trust.

The Trustees (and other fiduciaries) shall be bonded in the amount and to the extent required by the Pension Reform Act and to the extent permitted by such Act, the expense thereof shall be paid by the Pension Trust.

(13) To cause an annual audit to be made of the Pension Trust by a certified public accountant. Copies of said audit shall be furnished to the parties, and a copy shall be available at the principal office of the Pension Trust for inspectors by interested persons.

(14) To procure appropriate fidelity bonds for such agents, servants and employees of the Trustees as may receive, disburse or otherwise deal with the assets of the Pension Trust, the cost of such bonds to be borne by the Trust;

(15) To maintain any and all actions or legal proceedings which may be deemed necessary for the protection of the Pension Trust, the Plan or the Trustees, or to assure the payment of Employer contributions to the Pension Trust, or to secure the benefits contemplated hereby, in connection herewith to compromise, settle or release claims on behalf of or against the Pension Trust and/or the Trustees;

(16) To adopt rules and regulations for the administration of the Pension Trust;

(17) To delegate such of its powers and duties to individual Trustees or committees of Trustees, or to such servants, agents, or employees of the Trustees as may, in the opinion of the Trustees be available or appropriate;

(18) To construe the provisions of this Pension Trust Agreement and the Plan and any such construction adopted by the Trustees in good faith shall be binding upon any all parties or persons affected thereby.

(19) To enter into any and all contracts and agreements for carrying out the terms of the Plan and the Pension Trust and for the administration of such Plan and Trust including Reciprocal Agreements providing for pro rata pensions; and

(20) To do all acts, including those acts necessary to comply with any of the requirements of the Pension Reform Act or any other law, which they may deem necessary or proper and to exercise any and all powers of the Trustees under this instrument under such terms and conditions as they may deem to be for the best interest of the Trust.

The Bank Trustee may, in its sole discretion, cause the securities which from time to time may comprise the Trust, to be registered in its name as Trustee hereunder,

or in the name of its nominee without disclosing the ownership thereof or to take and keep the same unregistered, and to retain them, or any part thereof, in such condition that they will pass by delivery.

ARTICLE VII

The expenses incurred by the Trustees in the performance of their duties hereunder, including reasonable compensation for the Trustees in accordance with the Pension Reform Act, for agents and for service of counsel rendered to the Trustees and expenses incident thereto, and all other proper charges and disbursements of the Trustees, including all taxes of any kind and all kinds whatsoever that may be levied or assessed under existing or future laws of any jurisdiction upon or in respect to the Trust hereby created or any money, property or securities forming a part thereof, shall be paid by the Trustees out of the Trust.

ARTICLE VIII

The Bank Trustee shall not be liable for the making, retention or sale of any investment or reinvestment made by it as herein provided; for any loss to or diminution of the Trust; or as to both Trustees for anything done or omitted under this instrument, except for his own willful misconduct or lack of good faith, or any other action or omission for which personal liability is imposed under the Pension Reform Act. Any Trustee may consult with legal counsel concerning any questions which may arise with reference to his duties under this instrument, and, except as otherwise provided by the Pension Reform Act, the opinion of such counsel shall be full and complete protection in respect to any action taken or suffered by such Trustee hereunder in good faith and in accordance with the opinion of such counsel.

ARTICLE IX

The Trustees, or such other persons as may be properly designated pursuant to Article IX hereof, shall keep accurante and detailed accounts of all investments, receipts, and disbursements and other transactions hereunder, and such accounts, books and records relating thereto shall be open to inspection and audit by the parties hereto and by the Employees and the beneficiaries of the Pension Trust at all reasonable times at the offices of the Pension Trust. The Trustees, or such other persons as may be properly designated pursuant to this Article IX shall be responsible for providing participants and beneficiaries under the Plan with all information required to be furnished pursuant to the provisions of the Pension Reform Act.

The Trustees, or such other persons as may be properly designated pursuant to this Article IX shall be responsible for maintaining records sufficient to comply with any requirements of the Pension Reform Act and for the filing of all reports with the Labor Department, Treasury Department, and Pension Benefit Guaranty Corporation which may be required by any provision of the Pension Reform Act. The Trustees shall provide to and make available to employees, participants and beneficiaries, as the case may be, all reports, applications for determination letters, descriptions and other information required to be filed or reported pursuant to the Pension Reform Act and any and all other records of the Pension Trust which pertain to said Employees, participants and beneficiaries. Further, said employees, participants and beneficiaries shall be entitled to receive any schedule, summary, report or other disclosure provided to him under the Pension Reform Act within the time periods prescribed by said Act. The Trustees are authorized to apply for permission to implement an alternative method of satisfying any of the requirements of this Article IX in accordance with the Pension Reform Act, and, upon

receiving the approval of the Labor Department for such alternative method, may utilize such method in lieu of the corresponding requirements of the Pension Reform Act and of Article IX of this instrument.

The Trustees are hereby authorized to allocate fiduciary responsibilities in any manner permitted pursuant to the Pension Reform Act.

If the Bank Trustee declines the investment responsibilities, the Employer may appoint an investment manager or managers to manage any investments held under this instrument as permitted by the Pension Reform Act.

ARTICLE X

The Employer reserves the right at any time and from time to time to modify or amend in whole or in part any or all of the provisions of this instrument, without reopening or otherwise affecting the integrity of any other provision of the Collective Bargaining Agreement, by a written agreement; provided, however, that such modification or amendment does not permit any part of the corpus or income of the Pension Trust to be used for, or diverted to, purposes other than for the sole and exclusive benefit of the employees, participants and their beneficiaries.

Upon complete or partial termination of this Pension Trust or the Plan, or both, or upon complete discontinuance of contributions under the Plan, as defined by Section 411 of the Code, the rights of all employees, participants and beneficiaries to benefits accrued to the date of such termination or discontinuance, to the extent then funded, are fully vested and are nonforfeitable. If this Pension Trust, or the Plan, is terminated, the assets then remaining in the Pension Trust after providing for the expenses of the Pension Trust and the Plan shall be allocated, disposed of, held or distributed in the manner and priority provided in the Pension Reform Act in respect of Terminations and specifically as provided in Section 4041, 4042, 4044 and 4045 of ERISA.

ARTICLE XI

Notwithstanding anything to the contrary contained in this instrument, or any amendment thereto, it shall be unlawful for any part of the Pension Trust, other than such part as is required to pay taxes and administrative expenses, to be used for, or diverted to, purposes other than for the sole and exclusive benefit of the employees, participants and beneficiaries of the Plan.

Moneys held by the Pension Trust do not constitute a part of the deceased beneficiary's estate which can be claimed by his administrator, executor, or heirs, unless such person or persons or otherwise eligible under the terms and conditions of the Plan, nor are said moneys equivalent to the proceeds of an insurance policy in which a beneficiary may be designated; and no participant or beneficiary of the Plan may, during his lifetime, assign, devise or will moneys from this Trust, and any attempt so to do shall be void.

ARTICLE XII

This instrument shall be construed, regulated and administered under the laws of the State of ————————.

IN WITNESS WHEREOF, each of the parties signatory hereto, pursuant to proper authority, has caused this instrument, effective January 12, 1975, to be signed by its proper offices or representatives this ———————— day of ————————, 1975.

Attest:

————————————

(SEAL)

AMAX COAL COMPANY

By: ————————————

Its: ————————————

TRUSTEES

————————————

(Employer)

Attest:

————————————

(SEAL)

COLORADO NATIONAL BANK

By: ————————————

Trust Officer

EXHIBIT 2(b)

TEN YEAR VESTING

AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN EFFECTIVE JANUARY 12, 1975

ARTICLE I—INTRODUCTION

Pursuant to the Collective Bargaining Agreement, the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN (hereinafter referred to as the "Plan"), provides pension benefits as hereinafter set forth. The provisions of the Plan are effective January 12, 1975, (the "effective date") and are set forth below.

It is the intention of the Employer, the Trustees, and the participants that the Plan be in complete compliance with the requirements and limitations set forth in the Internal Revenue Code and the Labor Law. Accordingly, all of the terms and conditions of the Pension Reform Act, by regulation or ruling, promulgated in compliance therewith by the Secretary of Treasury or prescribed in compliance therewith by the Secretary of Labor, are hereby incorporated into and made a part of this Plan. In the event of ambiguity or doubt as to the meaning of a word, paragraph or article hereof, or other interpretation of this Plan, the meaning and interpretation provided in said Act shall be used. This Plan shall be construed, applied and administered as to be in compliance, at all times, with the terms of the Pension Reform Act.

A. *Definitions.*

(1) "Collective Bargaining Agreement" means the the Collective Bargaining Agreement between AMAX COAL COMPANY and LOCAL UNION NO. 1854 of the

United Mine Workers of America for the Belle Ayr Mine, dated ————————, 1975 and any amendments thereto or renewals thereof.

(2) "Employer" means AMAX COAL COMPANY and any successor of said corporation. A successor Employer shall be subject to the provisions of the Pension Reform Act as to said Act's requirements concerning years of service with a predecessor Employer, participation, vesting, funding and other similar provision.

(3) "Participant" means any individual employed by Employer in the appropriate bargaining unit certified in NLRB Case No. 27-RC-4914 and on whose behalf contributions have been made to this Plan by the Employer pursuant to the Collective Baragining Agreement and the Pension Trust, and any other individual entitled to receive pension benefits under the Plan.

(4) "Pension Trust" means the trust established pursuant to the Collective Bargaining Agreement to fund this Plan.

(5) 'Trustees" means the Trustees of the Pension Trust, who shall be named fiduciaries pursuant to the Pension Reform Act; provided, however, that the Pension Trust may be amended to designate other or additional named fiduciaries under said Trust and the Plan.

(6) "Credited Service" means the years of service which are accumulated and maintained for participants in accordance with Article IV and includes related Credit Service performed for Employers signatory to a plan that is recognized as a related plan by the Trustees of this and the related plan for the purposes of determining eligibility for and payment of pro rata pensions.

(7) "Releated Service" means work performed for employers who are signatory to a plan that is recognized as a "related plan" by the Trustees of this and the related plan for the purposes of determining eligibility for and the payment of pro rata pensions.

B. *When Retirement Occurs.*

For the purposes of this Plan, in the case of any participant, retirement shall be considered to occur on the last day of credited service, provided that on such day he was eligible for an immediate or deferred pension under this Plan.

ARTICLE II—ELIGIBILITY

A. *Age 55 Retirement.*

Any participant who (a) has at least ten (10) years of credited service, and (b) has attained the age of fifty-five (55) years (but not the age of sixty-two (62)) prior to retirement shall be eligible to retire on or after January 12, 1975, and shall upon his retirement (hereinafter "Age 55 Retirement") be eligible for a pension.

B. *Age 62 Retirement.*

Any participant who (a) has at least ten (10) years of credited service, and (b) has attained the age of sixty-two (62) years prior to retirement, shall be eligible to retire on or after January 12, 1975, and shall upon his retirement (hereinafter "Age 62 Retirement") be eligible for a pension. Age sixty-two (62) shall be considered the normal retirement age for purposes of the Pension Reform Act.

C. *Disability Retirement.*

A participant who (a) has at least ten (10) years of service prior to retirement, and (b) becomes totally disabled on or after the effective date as a result of a mine accident shall, upon his retirement (hereinafter "Disability Retirement"), be eligible for a pension. A participant shall be considered to be totally disabled only if by reason of such accident he is subsequently determined to be eligible for Social Security Disability Insurance Bene-

fits under Title II of the Social Security Act of its successor.

D. *Minimum Disability Retirement.*

Any participant who (a) has less than ten (10) years of signatory service prior to retirement and (b) becomes totally disabled on or after the effective date as the result of a mine accident shall, upon his retirement (hereinafter "Minimum Disability Retirement"), be eligible for a pension. A participant shall be considered to be totally disabled only if by reason of such accident he is subsequently determined to be eligible for Social Security Disability Insurance Benefits under Title II of the Social Security Act or its successor.

E. *Deferred Vested Retirement.*

Any participant not eligible to receive a pension under any other provision of this Article II whose employment with the Employer is terminated after January 12, 1975, for any reason and who at the time of retirement has at least ten (10) years of credited service shall be eligible for a pension (hereinafter "Deferred Vested Pension"), upon attaining age sixty-two (62), or, at the election of the participant, he shall be eligible for a reduced pension beginning at any time after he attains age fifty-five (55). At the time of such termination, such participant shall be given an appropriate written notice of his eligibility and other relevant data.

F. *Nonduplication.*

A participant shall be entitled to receive a pension under only one of the foregoing paragraphs of this Article II with respect to any retirement.

G. *Employment for Vesting Purposes.*

For all purposes of this Article II, years of employment shall be computed by giving credit for one year of employment for any year for which the participant

completed 1,000 hours of employment; provided that (a) all years of employment before age twenty-two (22) shall be disregarded, (b) all years of employment before January 1, 1971, shall be disregarded unless the participant completed at least three (3) years of employment after December 31, 1970, and (c) years of employment prior to any break in service shall be disregarded to the maximum extent permissible under Section 203(b)(3) of the Employee Retirement Income Security Act of 1974. The provisions of this paragraph shall be interpreted and construed in accordance with the requirements of the Pension Reform Act and the regulations issued thereunder.

Years of service for an employer who is a party to a Reciprocal Agreement to which the Trustees of this Plan are signatory on behalf of this Plan may be counted as related credited service, see Reciprocal Agreement, if any.

ARTICLE III—AMOUNT OF PENSION

A. *Retirement in 1975-1976.*

A pension granted to a participant who retires on and after January 12, 1975, but prior to January 1, 1977 pursuant to Article II shall consist of a pension amount payable in monthly installments provided in accordance with the provisions of this Article III as set forth below.

(1) *Age 55 Retirement Pension.*

(a) a deferred pension, commencing after attainment of age sixty-two (62), computed under the provisions of Subsection A(2), below; or, at the election of the participant, (b) an immediate pension, equal to the deferred pension to which he would have been eligible under (a) above had he so elected, reduced by ¼ of one percent (.025%) for each full month (three percent (3%) per year), between the date on which pension benefits

began and the date on which participant attains age sixty-two (62).

(2) *Age 62 Retirement Pension.*

The amount of pension for Age 62 Retirement or Disability Retirement, subject to a minimum pension of $125.00 per month for Disability Retirement, shall be determined as follows:

(a) for each of the first ten (10) years of credited service, $13.00 per month;

(b) for each year of credited service in excess of ten (10) years, but not to exceed twenty (20) years, $13.50 per month;

(c) for each year of credited service in excess of twenty (20) years, but not to exceed thirty (30) years, $14.00 per month;

(d) for each year of credited service in excess of thirty (30) years, $14.50 per month.

Proportional credit shall be allowed for any fractional years of credited service pursuant to Article IV hereof.

(3) *Minimum Disability Retirement Pension.*

The amount of pension for Minimum Disability Retirement shall be $125.00 per month.

(4) *Deferred Vested Pension.*

The amount of a deferred vested pension shall be a pension, commencing on or after attainment of age sixty-two (62), computed under the provisions of Subsection A(2), above, or, at the participant's election, between ages fifty-five (55) and sixty-two (62) with the pension payable reduced to its actuarial equivalent pursuant to Appendix A.

B. *Retirement in 1977 or Thereafter.*

A pension granted to a participant who retires on or after January 1, 1977, pursuant to Article II shall consist of a pension amount payable in monthly installments provided in accordance with the provisions of this Article III as set forth below.

(1) *Age 55 Retirement Pension.*

(a) a deferred pension, commencing after attainment of age sixty-two (62), computed under the provisions of Subsection B(2), below, or, at the election of the participant, (b) an immediate pension, equal to the deferred pension to which he would have been eligible under (a) above had he so elected, reduced by ¼ of one percent (.025%) for each full month (three percent (3%) per year) between the date on which pension benefits began and the date on which the participant attains age sixty-two (62).

(2) *Age 62 Retirement and Disability Retirement Pension.*

The amount of pension for Age 62 Retirement or Disability Retirement, subject to a minimum pension of $125.00 per month for Disability Retirement, shall be determined as follows:

(a) for each of the first ten (10) years of credited service, $13.50 per month;

(b) for each year of credited service in excess of ten (10) years, but not to exceed twenty (20) years, $14.00 per month;

(c) for each year of credited service in excess of twenty (20) years, but not to exceed thirty (30) years, $14.50 per month;

(d) for each year of credited service in excess of thirty (30) years, $15.00 per month.

Proportional credit shall be allowed for any fractional years of credited service pursuant to Article IV hereof.

(3) *Minimum Disability Retirement Pension.*

The amount of pension for minimum disability retirement shall be $125.00 per month.

(4) *Deferred Vested Pension.*

The amount of a deferred vested pension shall be a pension, commencing on or after age sixty-two (62), computed under the provisions of Subsection B(2), above, or, at the participant's election, between ages fifty-five (55) and sixty-two (62) with the pension payable reduced to its actuarial equivalent pursuant to Appendix A.

C. *Increased Pension.*

Effective as of January 1, 1977, the pension of any participant who retired under this Plan on or after January 12, 1975, and whose pension was computed under the provisions of Subsection A(1) and Subsection A(2) of this Article III shall be increased by $10.00 per month. This increase will not be applicable to those participants who are eligible for either a Minimum Disability Retirement Pension or who become eligible to receive a Deferred Vested Pension.

D. *Commencement, Suspension and Termination of Pensions.*

Payments of pensions shall be subject to the following:

(1) The first payment on any pension shall be made for the month following the month in which the participant becomes eligible for a pension in accordance with Article II.

(2) The last payment to the pensioner shall be for the month in which the pensioner dies, but see the Widow's Benefit.

(3) Pension payments shall be payable on the first day of each month at the pensioner's last address of record.

(4) Any participant who continues to be employed by the Employer after his retirement shall not be entitled to receive pension benefits under this Plan until such time as he is no longer employed by the Employer.

(5) Years of service with other employers who are signatory to a Reciprocal Agreement to which this Plan is a party may be counted, under some circumstances, as credited service under this Plan; however, the amount of pension payable under this Plan shall be subject to the terms and conditions of the Reciprocal Agreement and under no circumstances shall this Plan be obligated to pay more than the pro rata pension due the participant under the Reciprocal Agreement.

ARTICLE IV—CREDITED SERVICE

A. *Credited Service.*

Subject to the limitations in paragraph B of this Article IV, credited service is a period during which the participant meets the requirements of subparagraphs (1), (2), or (3), below.

(1) A participant shall receive credit for a year of service for any year in which he worked as an employee either (a) at the Belle Ayr Mine of the AMAX COAL COMPANY for Employer, or, (b) in related service, and with credit given for the next lowest ¼ year in the event any employee works less than 1,000 hours of service as follows:

750 - 999 hours, ¾ year
500 - 749 hours, ½ year
250 - 499 hours, ¼ year
249 hours or less, 0

It is recognized that it may be difficult to establish with certainty the credited service of a participant in the employment referred to above. In making the necessary determinations as to credited service, the Trustees may, in their absolute discretion, consider and rely upon any relevant and material evidence, including without limitation any or all of the following:

(a) A statement from the Administrator of a related plan certifying to the receipt of employer reports with respect to hours worked by the participant and stating the number of hours reported for the period covered by the statement.

(b) A statement from an employer certifying that the participant performed work for such employer entitling him to credited service during such period if such employer was known or reputed to be operating in the coal mining industry and was a signatory employer to the Related Plan.

(c) A statement from the secretary or other authorized officer of a local union of the United Mine Workers of America certifying that the participant was a member in good standing in such Union during such period.

(d) A W-2 form or check stub furnished for work performed during the period for any employer known or reputed to have been operating in the coal mining industry and was a signatory employer to the Related Plan.

(e) A statement from the Social Security Administration to the effect that according to its records the participant was employed during the period by a named employer, which employer was known or reputed to be operating in the coal mining industry and was a signatory employer to the Related Plan.

(2) A participant shall receive credit for a year of service for any year in which he received state work-

men's compensation payments pursuant to an award as a result of an occupational disease or injury sustained in the mine; provided, in the case of said occupational disease or injury, the participant had been so employed by the Employer in the Belle Ayr Mine for at least three (3) consecutive calendar years prior (but not necessarily immediately prior to) the disability or injury. Credit shall be given up to a maximum of four (4) years service credit from the date of injury, or from the date of last employment in case of occupational disease provided the participant did not work regularly during the compensable period.

(3) A participant shall receive credit for a year of service for any year in which he served in the military service of the United States in any war, national emergency, or international police action, immediately following regular employment with Employer in the Belle Ayr Mine; provided, that credit for such service shall be limited to the original period of enlistment or obligated military service; and, provided, further, that the participant returned to work with Employer at the Belle Ayr Mine within twelve (12) months after his date of separation from the military service, unless he was precluded from doing so by service connected sickness, accident, or other disability, and returns to work for Employer at the Belle Ayr Mine when no longer precluded by such disability. Service credit for the period of military service shall be computed in the same manner as described in paragraph (1), above.

B. *Additional Rules Concerning Credited Service.*

(1) A participant shall not be credited with more than one year of service for any calendar year by reason of any combination of the rules of this Article IV.

(2) Except as provided in Article V, service credits shall not be accrued subsequent to the effective date of pension payments.

(3) In the case of any participant, the last day of credited service shall be the last day on which the par-

ticipant works as an employee for Employer at the Belle Ayr Mine, unless such participant continues to accrue credited service during the period for which he receives weekly sickness and accident benefits pursuant to the Collective Bargaining Agreement, in which case the last day of credited service shall be the last day of sickness and accident benefits are paid.

ARTICLE V—REEMPLOYMENT AFTER ATTAINMENT OF PENSION ELIGIBILITY

A. Any participant who has been retired and receiving a pension under this Plan and who shall be reemployed by an Employer shall, for the purpose of calculating any subsequent pension benefits to which he may become entitled, upon his subsequent retirement, be granted a pension equal to the sum of the pension he was previously receiving plus the excess of (i) over (ii) where (i) is the pension to which such participant would be entitled at the time of such retirement, based upon all years of credited service under the Plan and (ii) is the pension to which such participant would be entitled at the time of such retirement, based solely on his credited service at the time of his previous retirement.

B. Any participant eligible for a deferred vested pension under this Plan who shall be reemployed by the Employer prior to the commencement of pension benefits shall, for the purpose of calculating any subsequent pension benefits to which he may become entitled, be granted his credited service applicable to the deferred vested pension plans plus his credited service accrued after such reemployment.

ARTICLE VI—SURVIVING SPOUSE BENEFIT

A. (1) Except as provided in paragraph B., and subject to the requirements of the Pension Reform Act, there is hereby provided a Surviving Spouse Benefit for any

participant who (a) has retired and is receiving a pension under this Plan, except a participant receiving a deferred vested pension who has not completed at least ten (10) years of credited service, (b) has not retired, but, at the date of his death, otherwise has met the eligibility requirements for an immediate pension under Article IIA., B., C., or D. under this Plan, and (c) is over age fifty-five (55) with at least ten (10) years of credited service and who has retired and is entitled to elect an immediate pension under Article IIA. or IIE. at the date of his death.

(2) The amount of such benefit shall be equal to fifty percent (50%) of the amount of the participant's pension at the time of his death or, in the event the participant dies after age fifty-five (55) at a time when he was eligible to elect a pension or to retire and receive a pension under Article II, but prior to his receipt of a pension, fifty percent (50%) of the amount of the pension he would have received if he had elected a pension or retired and become entitled to a pension as of the date immediately preceding the date of his death.

(3) The Surviving Spouse Benefit will not be effective unless the participant and his spouse have been married throughout the nine (9) month period ending on the date of the participant's death or unless such nine (9) month requirement would be waived for purposes of determining entitlement to widow's insurance benefits under the Social Security Act.

(4) Payment to an eligible spouse will commence as of the first of the month following the month in which the participant's death occurs and the final payment shall be made for the month in which the spouse's death occurs.

B. (1) Any participant who is not employed by the Employer at the Belle Ayr Mine on the effective date is not covered for a Surviving Spouse Benefit under this Article unless (a) he obtains at least three (3) years of credited service after the effective date, (b) he had ceased to be employed by the Employer as a result of

(i) layoff, (ii) nonoccupational disability or accident, or (iii) occupational injury for which he was receiving workmen's compensation, or (c) he dies at a time when he is employed by the Employer at the Belle Ayr Mine.

ARTICLE VII—JOINT AND SURVIVOR ANNUITIES

Notwithstanding any other provision of this Plan, if a participant qualifies for a pension under this Plan, but is not covered for a surviving spouse benefit, the pension benefit otherwise provided to such participant shall be reduced actuarially pursuant to Appendix B and fifty percent (50%) of such reduced pension benefit will be continued, after the death of the participant, for the life of any qualified surviving spouse; provided, however, that such participant shall have a reasonable period before the starting date of his pension benefit to elect not to take a joint and survivor annuity as provided for in this Article and instead to receive a pension benefit for his life only which shall be computed pursuant to Appendix A and shall be the actuarial equivalent of the joint and survivor annuity computed under Appendix B. Prior to the exercise of an election under this paragraph, the participant must be provided with a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election not to receive such annuity. In the event a participant elects not to receive a joint and survivor annuity, such election shall not become effective if the participant dies within a period of two (2) years beginning on the date of such election. A qualified surviving spouse shall be any spouse who has been married to the participant for at least nine (9) months prior to his death, unless such nine (9) month requirement would be waived for purposes of determining entitlement to widow's insurance benefits under the Social Security Act.

In the event that a participant who was subject to this Article and who was entitled to elect to receive a pension benefit shall die prior to receipt of a pension, his qualified surviving spouse shall be entitled to receive

a survivor's benefit in the form of an annuity for life in an amount equal to fifty percent (50%) of the pension benefit the decedent would have received if he had elected to receive a pension beginning on the date immediately preceding the date of death.

Payment to a qualified surviving spouse under this Article will commence as of the first of the month following the month in which the participant's death occurs and the final payment shall be made for the month in which the spouse's death occurs.

ARTICLE VIII—MISCELLANEOUS

A. *Determination of Eligibility.*

The Trustees or such other named fiduciaries as may be properly designated shall have full and final determination as to all issues concerning eligibility for benefits.

B. *General.*

(1) The Trustees are authorized to promulgate rules and regulations to implement this Plan, and those rules and regulations shall be binding upon all persons dealing with and participants claiming benefits under this Plan.

(2) No benefit payable under this Plan shall be subject in any way to alienation, sale, transfer, assignment, pledge, attachment, garnishment, execution, or encumbrance of any kind, and any attempt to accomplish the same shall be void.

(3) This Plan may be amended pursuant to the provisions of the Collective Bargaining Agreement or may be terminated during the life of the Collective Bargaining Agreement by agreement of the parties thereto; provided, however, that:

(a) this Plan shall not be amended or terminated in such manner as would cause or permit any part of the assets in the Pension Trust to be diverted

to purposes other than the exclusive benefit of the participants and their beneficiaries, and

(b) this Plan shall not be amended to deny to a participant retroactively any benefits to which he was entitled under this Plan, unless such amendment is necessary to conform this Plan to, or to satisfy the conditions of any law, governmental regulations or ruling.

(4) Upon the termination of this Plan of the complete discontinuance of contributions to the Pension Trust, this Plan shall remain in force and effect for the period necessary to complete the payment of benefits in accordance with the terms of this Plan to the extent assets in the Pension Trust are available to pay such benefits.

(5) Forfeitures arising from the operation of the Plan shall not be used to increase the benefits which otherwise would be received under this Plan.

(6) Any participant or beneficiary whose claim for benefits under this Plan has been denied shall be (a) provided with adequate notice in writing setting forth the specific reasons for such denial, which notice shall be written in a manner calculated to be understood by the participant, and, (b) afforded a reasonable opportunity for a full and fair review of the decision denying the claim by an appropriate named fiduciary or a person properly designated to carry out such responsibility.

(7) The Trustees are hereby authorized to allocate fiduciary responsibilities in any manner permitted pursuant to Section 405(c) of the Employee Retirement Income Security Act of 1974.

(8) Contributions to the Pension Trust to fund the benefits under this Plan shall be paid solely by the Employer in accordance with the greater of:

(a) a contribution rate by Employer of an amount, based on actuarial calculations, sufficient to provide for current service benefits and to amortize any un-

funded past service liabilities over a period not to exceed thirty (30) years, or

(b) a contribution rate required under Section 412 of the Code to satisfy the minimum funding requirements.

And, provided, however, that Employer contributions hereunder shall in no event exceed the limitations on benefits and contributions set forth in Section 415 of the Code for pension plans.

All actuarial calculations shall be made by an enrolled actuary as provided in the Employee Retirement Income Security Act of 1974 and all calculations shall be in conformity with said Act.

Contributions by the Employer in compliance with this paragraph (8) shall be in complete and full discharge of Employer's obligations under this Plan and the Pension Trust and the Employer shall not be liable to any employee, participant, beneficiary of a participant or bargaining representative of any such employee or participant for contributions or additional contributions.

ARTICLE IX—PAYMENTS OF BENEFITS UPON EARLY TERMINATION OF PLAN.

Notwithstanding any provisions in this Plan to the contrary during the period described below, the benefits provided by the Employer's contributions for "restricted participants" who are those participants whose annual benefit provided by such contributions will exceed ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500), but applicable only to the twenty-five (25) highest paid employees as of the time of establishment of the Plan (including any such high paid employees who are not participants at that time, but may later become participants) shall be subject to the conditions set forth below. These conditions shall continue for a period of ten (10) years following the date of establishment of the

Plan, and if at the end of ten (10) years the full current costs under the Plan have not been funded, these conditions shall continue until the full current costs are funded for the first time.

(1) Certain benefits (hereinafter called "unrestricted benefits") shall be paid to a restricted participant in full which have been provided by the Employer's contributions not exceeding the larger of the following amounts:

(a) TWENTY THOUSAND DOLLARS ($20,000); or

(b) An amount equal to twenty percent (20%) of the first FIFTY THOUSAND DOLLARS ($50,000) of the participant's average regular annual compensation multiplied by the number of years between the date of establishment of the Plan and whichever of the following dates shall be applicable:

(i) the date of termination of the Plan if the Plan is terminated within ten (10) years from the date of its establishment, or the date of the failure to meet full current costs if earlier;

(ii) in the case of a restricted participant described in this Article for whom such benefits become payable within ten (10) years after the date of establishment of the Plan, the date benefits become payable under the Plan, or the date of the failure to meet full current costs if earlier; or

(iii) in the case of a restricted participant described in this Article for whom benefits become payable under the Plan after the Plan has been in effect ten (10) years if the current costs of the Plan for the first ten (10) years have not been funded, the date of the failure to meet full current costs.

(2) If the Plan is terminated or the full current costs thereof have not been met at any time within ten (10) years after the establishment of the Plan, the benefits which any of the restricted participants described in this Article may receive from the Employer's contributions shall not exceed the benefit set forth in (1), above, and if at the end of ten (10) years from the date of establishment of the Plan the full current costs have not been met, the benefits which any of such participants may receive from the Employer's contributions shall not exceed the benefit set forth in (1), above, until the full current costs are funded for the first time.

(3) If a restricted participant described in this Article leaves the employ of the Employer or withdraws from participation hereunder when the full current costs have been met, the benefits which he may receive from the Employer's contributions shall not exceed the benefits set forth in (1), above, until the Plan has been in force for ten (10) years from the date of its establishment and the full current costs have been funded.

(4) These conditions shall not restrict the full payment of any insurance, death, or survivor's benefits on behalf of a participant who dies while the Plan is in full effect and its full current costs have been met.

(5) These conditions shall not restrict the current payment of full retirement benefits for any retired restricted participant described in this Article in the form of level amounts of annuity not greater than the level annuity under the basic form of benefit provided in the Plan, while the Plan is in full effect and its current costs have been met.

(6) In the event of termination of this Plan within the period described in the second sentence of this Article, any excess benefits purchased by the Employer's contributions for restricted participants described in this Article shall be reduced to cash and distributed to unretired participants other than those restricted by this

Article in the same proportion as the total contributions theretofore made for their benefits hereunder.

In the event that the Employer's Plan shall be changed so as to increase substantially the extent of possible discrimination as to contributions and as to benefits actually payable in the event of the subsequent termination of the Plan or the subsequent discontinuance of contributions thereunder, then the provisions of this Article IX shall be applied to the Plan as so changed as if it were a new Plan established on the date of such change. However, the provision in Section (1) permitting payment in full of benefits based on at least TWENTY THOUSAND DOLLARS ($20,000) shall be applicable to the aggregate amount contributed by the Employer on behalf of the participant from the date of establishment of the original Plan, and, for purposes of determining if the participant's anticipated annual pension exceeds ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500), both the Employer contributions on the participant's behalf prior to the date of the change in the Plan and those expected to be made on his behalf subsequent to the date of change (based on his rate of compensation on the date of the change) are to be taken into account.

In the case of any increase in benefits under the Plan, those unrestricted benefits to be paid to a restricted participant in full shall thereafter be determined in the following manner.

Such benefits shall be paid in full which have been provided by the Employer's contributions not exceeding the larger of the following amounts:

(a) the Employer's contributions (or funds attributable thereto) which would have been applied to provide the benefits for the participant if the Plan had been continued without change as it existed prior to the effective date of the change; or

(b) TWENTY THOUSAND DOLLARS ($20,000); or

(c) the sum of:

(i) Employer funds (or funds attributable thereto) which would have been applied to provide benefits for the participant if the Plan had not been changed, but had been terminated the day before the eflective date of the change; and
(ii) An amount equal to twenty percent (20%) of the first FIFTY THOUSAND DOLLARS ($50,000) of the participant's average regular annual compensation multiplied by the number of years between the effective date of the change and whichever of the following dates shall be applicable:

1. the date of termination of the Plan if the Plan is terminated within ten (10) years from the date of the change, or the date of the failure to meet full current costs if earlier;

2. in the case of a restricted participant described in this Article for whom such benefits become payable with ten (10) years after the effective date of the change, the date benefits become payable under the Plan as changed, or the date of failure to meet full current costs if earlier; or

3. in the case of a restricted participant described in this Article for whom benefits become payable under the Plan as changed after the Plan as changed has been in effect for ten (10) years if the current costs of the Plan as changed for the first ten (10) years from the effective date of the change have not been funded, the date of the failure to meet full current costs.

ARTICLE X—SIGNATURES

This instrument shall be construed, regulated and administered under the laws of the State of ————————.

IN WITNESS WHEREOF, each of the parties signatory hereto, pursuant to proper authority, has caused this instrument, effective January 12, 1975, to be signed by its proper officers or representative this ——— day of ————————, 1975.

Attest:

————————————

(SEAL)

EMPLOYER
AMAX COAL COMPANY

By: ————————————

Its: ————————————

TRUSTEES

———————— BANK

By: ————————————
Trust Officer

————————————

APPENDIX A

Actuarial Equivalence Factors for Deferred Vested Retirement Benefits Commencing Prior to Age 62

The following factors are to be multiplied by the full accrued benefit payable commencing at normal retirement age 62 to yield the equivalent benefit payable commencing at the indicated age:

AGE		Actuarial Equivalence	AGE		Actuarial Equivalence
Yrs.	Mos.	Factor	Yrs.	Mos.	Factor

EXHIBIT 2(c)

RECIPROCAL AGREEMENT

This RECIPROCAL AGREEMENT by and between the AMAX COAL COMPANY BELLE AYR MINE PENSION TRUST and the UNITED MINE WORKERS OF AMERICA PENSION AND BENEFIT TRUSTS is made and entered into by and among the representatives of the signatory Pension Funds which provide retirement and pension benefits for employees represented for the purpose of collective bargaining by one or more local unions affiliated with the United Mine Workers of America.

WITNESSETH:

WHEREAS, the representatives of each signatory Pension Fund acting under separate Trust Agreements are authorized and empowered to grant and administer retirement and pension benefits, under their respective retirement and pension plans, to employees who are or have been represented in collctive bargaining by local unions affiliated with the United Mine Workers of America; and

WHEREAS, many employees have been, are or may be, from time to time, employed by employers under contract to contribute to one of the signatory Pension Funds and at another time employed by an employer under contract to contribute to another of the Funds, and, as a consequence, an employee may be subject to the provisions of different pension plans; and

WHEREAS, many employees whose employment has been, is or may be, divided among employers obligated to contribute to more than one of the signatory Pension Funds may not be eligible for any pension benefits from any signatory Pension Fund or may not qualify for a full pension benefit because their years of covered em-

ployment have been or will be divided among various employers and local union jurisdictions; and

WHEREAS, each signatory Pension Fund desires to provide Pro Rata Pensions for employees who would be ineligible for any pension benefits from any signatory Pension Fund, or would not qualify for full pension benefits under any one of the signatory Pension Funds, because their years of covered employment have been divided between employers making contributions to two or more such Pension Funds; and

WHEREAS, each of the signatory Pension Funds have each adopted provisions (by way of amendment or otherwise) in their Pension Plans governing eligibility for any payment of Pro Rata Pensions, in the form annexed hereto as Exhibit A; and

WHEREAS, each of the signatory Pension Funds desires to provide for the implementation of the amendments providing for Pro Rata Pensions and the establishment of uniform procedures to carry out the terms of this Reciprocal Agreement; and

WHEREAS, the representatives of each signatory Pension Fund executing this Reciprocal Agreement on behalf of their respective Pension Fund represent and warrant that they have been duly authorized to make, execute and deliver this Reciprocal Agreement,

NOW, THEREFORE, in consideration of the premises, it is mutually understood and agreed as follows:

Section 1. Recognition. Each signatory Pension Fund, for the period it is bound by this Reciprocal Agreement, recognizes each other signatory Pension Fund as a "Related Plan" for the purposes of the terms of Exhibit A, and for the further purposes set forth in this Reciprocal Agreement.

Section 2. Cooperation. The effective administration of Pro Rata Pensions benefits by the signatory Pension

Funds, requires that each Fund exchange information with respect to the credited service of persons covered by such Fund, the status of Pro Rata Pensions paid from time to time by such Fund and the details of the plans of benefits provided by such Fund. The representatives of each signatory Pension Fund agree to cooperate in the exchange of relevant information and documents to permit implementation of the Pro Rata Pensions provisions in the attached Exhibit A and the disclosure and information requirements provided by the Employee Retirement Income Security Act of 1974. Each signatory Pension Fund shall comply promptly with any reasonable written request by another signatory Pension Fund for information or data necessary to carry out the purposes of this Reciprocal Agreement.

Section 3. No Change in Exhibit A. Each signatory Pension Fund agrees that no change shall be made in the provisions of the Article attached as Exhibit A, either by change of language or by any modification of the Pension Plan which would have the effect of changing the provisions of Exhibit A. It is further agreed that the only way a signatory Pension Fund can terminate the operation of the provisions of Exhibit A is to follow the "termination" provisions of this Reciprocal Argeement set forth in Section 6 hereof.

Section 4. Effective Date. The date this Reciprocal Agreement becomes operative shall be the date shown as the "Effective Date" on the signature page executed by each party to this Reciprocal Agreement.

Section 5. Duration of Reciprocal Agreement. This Reciprocal Agreement shall continue to be operative so long as two or more Pension Funds continue as signatories.

Section 6. Termination. Any signatory Pension Fund may terminate such Fund's participation in this Reciprocal Agreement upon ninety (90) days' written notice in advance of the date of such termination provided that such written notice complies with the following:

(a) It states the effective date of termination of participation in the Reciprocal Agreement, and such date shall not be less than ninety (90) days from the date of mailing of such written notice.

(b) A copy is sent by certified mail addressed to each of the other signatory Pension Funds.

(c) It reflects that the withdrawal of the Pension Fund has been duly approved by the withdrawing Pension Fund.

It is agreed that once a signatory Pension Fund has terminated its participation in this Reciprocal Agreement, is may not thereafter become a party to this Agreement unless written consent is received from all Pension Funds participating as signatory Pension Funds at the time such Pension Fund may wish to reparticipate.

Section 7. Arbitration. Any dispute, controversy or claim arising out of or relating to the application of this Reciprocal Agreement, or branch thereof, shall be settled by arbitration. Either signatory Pension Fund which is a party to a dispute, controversy or claim involving another signatory Pension Fund under this Agreement which the representatives of the Funds involved cannot resolve within ninety (90) days after the matter has been presented in writing by the aggrieved or moving signatory Pension Fund to the other signatory Pension Fund may request arbitration of the issue by filing a written notice of its desire for arbitration, in which notice it shall set forth the nature of such dispute, controversy or claim by certified mail. If the representatives of the signatory Pension Funds involved in the dispute cannot agree upon an arbitrator within thirty (30) calendar days, then the representatives of any of the signatory Pension Funds mav apply to the senior judge of the United States District Court for the district in which the Fund has its situs, for the appointment of an arbitrator to hear the unresolved dispute, and such arbitration shall be conducted in accordance with such pro-

cedure as the arbitrator shall determine. The award of the arbitrator shall be final, binding and conclusive upon the parties to the dispute and may be enforced in any court of competent jurisdiction.

Section 8. Separate Liability.

(a) It is expressly understood and agreed that none of the signatory Pension Funds assumes any of the liabilities or obligations of any of the other signatory Pension Funds or parties to this Reciprocal Agreement. Each signatory Pension Fund shall be liable solely and exclusively for pension benefits due under its own pension plan, and no signatory Pension Fund shall be liable for the acts or omissions of any other Pension Fund.

(b) Each signatory Pension Fund and its representatives shall be fully protected in acting upon any instrument, certificate, report or paper believed by its representatives to be genuine, and the representatives of each signatory Pension Fund shall be under no duty to make any investigation or inquiry as to any statement in any such writing, or as to the authority of the person making such statement, but may accept the same as conclusive evidence of the accuracy of the statement contained therein and the authority to make it.

Section 9. Miscellaneous.

(a) Except as herein expressly provided, this Reciprocal Agreement may not be modified, varied or altered, except in writing executed by all of the then participating signatory Pension Funds.

(b) This Reciprocal Agreement shall be construed and enforced according to the laws of the State of Wyoming, and the Trustees of the signatory Pension Funds shall be liable to account with respect to this Reciprocal Agreement, and any rights and duties thereunder, only in the courts of the State of Wyoming.

IN WITNESS WHEREOF, the undersigned Pension Fund by the signature of its duly authorized representatives hereby becomes a party to the attached Reciprocal Agreement and agrees to be bound by its terms and provisions.

The effective date for the following Pension Fund shall be _____, 1975.

AMAX COAL COMPANY
BELLE AYR MINE PENSION TRUST
COLORADO NATIONAL BANK

By: _____

Its: _____

_____

EXHIBIT A

ARTICLE IIA

PRO RATA PENSIONS

Section 1. Purpose. Pro Rata Pensions are provided Employees who would otherwise be ineligible for a pension because their years of employment have been divided between employment creditable under this Plan and employment creditable under another pension plan or whose pensions would otherwise be in less than the full amount because of such division of employment.

Section 2. Related Plans. By resolution duly adopted, the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN may recognize another pension plan as a Related Plan.

Section 3. Related Credited Service. The term "Related Credited Service" means years of service, or portions thereof, creditable to an Employee under a Related Plan.

Section 4. Combined Credited Service. The term "Combined Credited Service" means the total of an Employee's Related Credited Service plus the credited service accumulated under the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN.

Section 5. Non-Duplication of Credits. An Employee shall not receive double credit for the same period of employment. No more than one year of Credited Service or Related Credited Service shall be given for all employment in any given year.

Section 6. Eligibility for a Pro Rata Pension.

(a) An Employee who is retired in accordance with Article II of the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN shall be eligible for a Pro Rata Pension if he meets the following requirements:

(1) He (or his spouse in respect of a Surviving Spouse Benefit) would be eligible for an Age 55 Retirement, Age 62 Retirement, Disability Retirement, Minimum Disability Retirement, or Deferred Vested Retirement pension under the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN credit; and

(2) He has earned at least one full year of AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN credited service; and

(3) He has earned (i) AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN credited service; (ii) Related Credited Service, or (iii) Combined Credited Service for which contributions were made or required to be made by a collective bargaining agreement to the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN or to a Related Plan.

Section 7. Amount of the Pro Rata Pension. In general, the amount of the Pro Rata Pension payable by the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN will be determined by multiplying the number of years of credited service by the appropriate pension factor (monthly dollar amount, adjusted by the actuarial factors provided in Appendix A and Appendix B to the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN) reduced or adjusted for the type of pension involved, as, for example, in the case of an Age 55 Retirement Pension if an immediate, but reduced, benefit is elected.

If the number of years of credited service, Related Credited Service or Combined Credited Service are sufficient as to require a determination of the Pro Rata Pension based on different monthly amounts, as, for example, the Pro Rata Pension would be based on credited service computed, in part, at $13.50 per month, and, in part, at $14.00 per month, the following rules shall apply.

(a) The chronology of credited service with each Plan Plan shall be established and the Pro Rata Pension shall be determined accordingly.

EXAMPLE: Assume for convenience, that all credited service takes place after January 1, 1977. Employee is employed by an employer signatory to a Related Plan for the period January 1, 1977, through January 1, 1987. He is then employed by the AMAX COAL COMPANY for the period January 2, 1987, through January 1, 1997. Employee retires with 20 years of Combined Credited Service, and is entitled to an Age 62 Retirement Pension. The Pro Rata Pension would be computed as follows: The AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN would pay a monthly pension of $140.00, i.e., 10 years of credited service under the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN x $14.00 per month, which is the monthly dollar amount for credited service in excess of 10 years, but not in excess of 20 years. The Related Plan would be obligated to pay Employee a Pro Rata Pension based upon 10 years of service, but computed using a monthly amount determined for the first 10 years of credited service in the Related Plan or such pension benefit as is, in fact, provided by the Related Plan for said 10 years of credited service.

EXAMPLE: Assume the same facts as in the previous example, except that the Employee is employed by the AMAX COAL COMPANY for the period January 1, 1977, through January 1, 1987. He is then employed by an employer signatory to a Related Plan for the period January 2, 1987, through January 1, 1997. The Pro Rata Pension would be computed as follows: The AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN would pay a monthly pension of $135.00, i.e., 10

years of credited service under the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN x $13.50 per month, which is the monthly dollar amount of credited service for the first 10 years of credited service in that Plan. The Related Plan would be obligated to pay Employee a Pro Rata Pension based upon 10 years of service, but computed using a monthly amount for credited service in excess of 10 years, but not in excess of 20 years, or such pension benefit as is, in fact, provided by the Related Plan for said 10 years of credited service.

EXAMPLE: Assume the same facts as in the previous examples, except that the Employee is employed by the AMAX COAL COMPANY for the period January 1, 1977, through January 1, 1972; by an employer signatory to a Related Plan for the period January 2, 1982, through January 1, 1987; by AMAX COAL COMPANY January 2, 1987, through January 1, 1992, and by the other employer January 2, 1992, through January 1, 1997. The Pro Rata Pension would be computed as follows: Employee has 10 years of credited service with the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN and 10 years of credited service with the Related Plan. His pension from the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN would be $137.50 per month determined in two steps: 5 years credited service during the Employee's first 10 years of credited service entitling him to a monthly dollar factor of $13.50 per month, or 5 x $13.50 = $67.50 per month. Employee also has 5 years of credited service during the Employee's second 10 years of credited service entitling him to a monthly dollar factor of $14.00 per month, or 5 x $14.00 = $70.00 per month. The total of the two increments is $137.50 per month. The pension payable by the Related Plan would be similarly computed or the Employee would be en-

titled to such pension benefit as is, in fact, provided by the Related Plan for said 10 years of credited service.

EXAMPLE: Assume the same facts as in the previous examples, except that the Employee is employed by the AMAX COAL COMPANY for the period January 1, 1977, through January 1, 1982, and by an employer signatory to a Related Plan for the period January 2, 1982, through January 1, 1987. Employee retires with 10 years of Combined Credited Service, and is entitled to an Age 62 Retirement Pension. The Pro Rata Pension would be computed as follows: The AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN would pay a monthly pension of $67.50, i.e., 5 years of credited service under the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN x $13.50 per month, which is the monthly dollar amount for the credited service for the first 10 years of credited service under the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN. The Related Plan would be obligated to pay Employee a Pro Rata Pension based upon 5 years of service, but computed using a monthly dollar amount determined for the first 10 years of credited service in the Related Plan or such pension benefit as is in fact provided by the Related Plan for said 5 years of credited service.

(b) It is recognized that it may be difficult to establish with certainty the Combined Credited Service and chronology of employment referred to in (a), above. In making the necessary determinations as to Combined Credited Service, the Trustees may, in their absolute discretion, consider and rely upon any relevant and material evidence, including without limitation any or all of the following:

(1) A statement from the Administrator of the Related Plan certifying to the receipt of employer reports with respect to hours worked by the Employee and stating the number of hours reported for the period covered by the statement.

(2) A statement from an employer certifying that the Employee performed work for such employer entitling him to Credited Service during such period if such employer was known or reputed to be operating in the mining industry and which or who was signatory to a Related Plan.

(3) A statement from the secretary or other authorized officer of the Union certifying that the Employee was a member in good standing in such Union during such period, or was employed by such Union during such period in a position included under the Plan pursuant to regulations adopted by the Trustees of said Plan.

(4) A W-2 form or check stub furnished for work performed during the period for any employer known or reputed to have been operating in the mining industry and which or who was signatory to a Related Plan.

(5) A statement from the Social Security Administration to the effect that according to its records the Employee was employed during the period by a named employer, which employer was known or reputed to be operating in the mining industry and which or who was signatory to a Related Plan.

Section 8. Payment. Payment of the Pro Rata Pension shall be subject to all the conditions applicable to the other pensions under the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN.

Under no circumstances shall the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN be obligated to pay a Pro Rata Pension in an amount in excess of a pension benefit determined by actual credited service with the AMAX COAL COMANY BELLE AYR

MINE PENSION PLAN determined in the manner provided in Section 8, above. Neither AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN nor any Related Plan shall be liable for the pension obligations of the other or any other Plan. The Pro Rata Pension obligation of the AMAX COAL COMPANY BELLE AYR MINE PENSION PLAN, determined as provided in this Agreement, shall be the sole obligation of this Plan and this Plan shall not be required to transfer funds or other assets to a Related Plan to satisfy any Pro Rata Pension obligation.

JOINT EXHIBIT 2(d)

AMAX COAL COMPANY
A DIVISION OF AMERICAN METAL CLIMAX, INC.
105 South Meridian Street
Indianapolis, Indiana 46225
(317) 539-6251

August 18, 1975

Mr. Joseph A. Yablonski
General Counsel
United Mine Workers of America
United Mine Workers Building
900 - 15th Street, N.W.
Washington, D.C. 20005

Dear Mr. Yablonski:

Enclosed you will find copies of the Amax Coal Company Belle Ayr Pension Plan, the Amax Coal Company Belle Ayr Mine Pension Trust Agreement, and a Reciprocal Agreement relative to the Pension Program. These documents are for your review, as discussed in our recent meeting in Louisville.

Please advise me if you have questions concerning these proposals.

Sincerely,

/s/ H. E. Payne, Jr.
H. E. PAYNE, JR.
Vice President—
Administration and
Employee Relations

HEP:wr

Enclosures

JOINT EXHIBIT 7(k)

AMAX COAL COMPANY
A DIVISION OF AMERICAN METAL CLIMAX, INC.
105 South Meridian Street
Indianapolis, Indiana 46225
(317) 539-6251

March 17, 1975

To The Employees of The Belle Ayr Mine:

Our final offer to the Union has been rejected. Our negotiations are at an impasse. We have informed the Union that we have decided to put our final offer into effect as of March 14, 1975.

This means that employees working on and after that date will be paid in accordance with our final proposal. Our proposal on wages and benefits is equal or better in some instances than the agreement signed by Peabody and a group of three other companies. We have been asked what it is and a comparison of the industry agreement and our proposal follows.

1. *Health & Welfare*—Better benefits than Peabody group. (See attached comparison.)
2. *Sickness & Accident Benefits*—Better than the Peabody group.
3. *Pension*—Better than Peabody group. (See attached comparison.)
4. *Protective Clothing Allowance*—Better benefits than Peabody group.
5. *Retroactive Allowance*—Better than Peabody group agreement.
6. *Wages*—Same as Peabody group agreement. (See attached sheets.)
7. *Holidays & Vacations*—In effect, same as Peabody group agreement.

8. *Job Bidding Procedures at Belle Ayr*—In effect, same as Peabody group agreement, except no agreement on panels at other mines.

9. *Discharge and Grievance Procedure*—In effect, same as Peabody group agreement.

We and other companies have been unable to conclude an agreement with the union. We have continued to negotiate for an agreement designed to meet the needs of our company and our employees and do not intend to be forced into signing anything less than that. The law says it is not legal to compel us to sign somebody else's agreement.

Since we have decided to exercise our right to continue our business, we recognize that there will be some who do not agree with what we are doing and may try to stop us. Such efforts are unlawful in view of what has happened and what the union has done. We intend to respect the rights of our employees and the union and we expect the same recognition of the rights of our company. Such mutual respect for each other's rights will prevent problems.

Quite often unions try to fine employees who exercise their lawful right to work during a strike. We don't believe any union has a right to coerce employees by threatening to fine or fining them to try to force them to engage in unlawful strikes or activities. If they do, we belive that action is in itself unlawful and can be stopped.

At any rate, since some of you have asked about union fines, remember no union can fine anyone who has withdrawn his membership in the union *before* he goes to work. We are not trying to get you to withdraw from the union, only you can make that decision. All we are telling you are *Your Rights*, namely, that the union cannot fine you if you aren't a member, and you may avoid any possibility of a fine if you aren't a member.

Wyoming is a right to work state. This means the union must represent you all fairly and equally whether you are a member or not. The benefits of any union contract must be made available to you, if one is ever entered into, whether you are a member or not. If you decide to withdraw from the union, you can do so simply by sending a letter to the local union telling them you wish to resign. We will treat all our employees the same whether they are members or not.

While we don't feel responsible for this strike, we do feel a sense of responsibility to each individual and their families, who have worked for us and toward the Community of Gillette. We hope the union and each of you has the same respect and feeling of responsibility and respect for others' rights and will no nothing to infringe their rights, personal health and safety.

We hope that all of you return to work as soon as possible. We do *not* want to *replace* anyone, although we have that right. We have taken precautions to provide for the personal safety and security of all employees and their families who decide to stop their unlawful strike and exercise their right to work.

If anyone attempts to threaten or coerce you, please let us know promptly. Appropriate corrective action can be taken if the facts are known by us.

/s/ H. E. Payne, Jr.
H. E. PAYNE, JR.
Vice President—Administration & Employee-Relations
AMAX Coal Company

HEP/lc

	AMAX Proposal	UMWA Proposal
1. All medical services and physicians services	All reasonable and customary charges are covered in full	Same
2. Prescription Drugs	Effective one year from effective date of Agreement all drugs will be paid with a $1.00 deductible per prescription	Payable only if drugs are needed for serious illness
3. Vision Care	1 examination per year ($15.00) 1 set of lenses per year ($8.00-$10.00-$12.00) 1 set of frames per 2 yrs. ($ 7.00)	No coverage provided
4. Major Medical	$250,000 lifetime with 100% co-insurance over $5,000.00 in calendar year, annual reinstatement of $1000 in each January 1.	$50,000 per lifetime with annual reinstatement up to $5,000.00 per year
	Includes convalescent and nursing home	$100.00 deductible with $300.00 limit per family
	$100.00 deductible with $300.00 limit per family	

	AMAX Proposal	UMWA Proposal
5. Sickness Insurance	$100.00 per week 0 to 6 mos. service; no benefits 6 mos. to 5 yrs.—13 weeks 5 yrs. to 10 yrs.—26 weeks 10 yrs. or more —52 weeks	$100.00 per week 0 to 6 mos. service; no benefits 6 mos. to 1 yr. — 6 w 1 yr. to 5 yrs.—13 w 5 yrs. to 10 yrs.—26 w 10 yrs. to 15 yrs.—39 w 15 yrs. or more —52 w
6. Accident Insurance	24 hour coverage $100.00 per week—Eligible from first day of accident or hospital—52 week coverage 1st day of employment	Same
7. Supplemental Accident	$300.00 per occurrence	None

COMPARISON OF PENSION BENEFITS

	AMAX PROPOSAL	UMWA Proposal
Eligibility for Retirement	Age 55 plus 10 years of service in coal mining industry	Same
Maximum benefits payable at age:	62	Same
Amount of Maximum Benefits payable for miners who ret. in:		
1975	$13.00 per month multiplied by years of service for first 10 years of service; $13.50 per month multiplied by years of service for the second 10 years of service; $14.00 per month multiplied by years of service for the third 10 years of service; $14.50 per month multiplied by years of service for each year over 30 years of service plus $10.00 per month after January 1, 1977.	$200 per month in 1975 $225 per month in 1976 $250 per month in 1977

	AMAX Proposal	UMWA Proposal
1976	$13.00 per month multiplied by years of service for first 10 years of service; $13.50 per month multiplied by years of service; $14.00 per month multiplied by years of service for the third 10 years of service; $14.50 per month multiplied by years of service for each year over 30 years of service plus; $10.00 per month after January 1, 1977.	$12.00 per month multiplied by years of service for first 10 years of service; $12.50 per month multiplied by years of service for the second 10 years of service; $13.00 per month multiplied by years of service for the third 10 years of service; $13.50 per month multiplied by years of service for each year over 30 years of service.
1977	$13.50 per month multiplied by years of service for first 10 years of service; $14.00 per month multiplied by years of service for the second 10 years of service; $14.50 per month multiplied by years of service for the third 10 years of service; $15.00 per month multiplied by years of service for each year over 30 years of service.	$12.50 per month multiplied by years of service for first 10 years of service; $13.00 per month multiplied by years of service for the second 10 years of service; $13.50 per month multiplied by years of service for the third ten years of service; $14.00 per month multiplied by years of service for each year over 30 years of service

estimate your pension under terms of both proposals, see the attached tables (Pages 138-141)

1977 (cont.)	AMAX PROPOSAL	UMWA Proposal
4. Pensions for Disabled Miners		
Less than 10 years of service	$125 per month	Same
More than 10 years of service	Minimum of $125 per month which is increased to pension levels at age 62 in the attached tables effective immediately	Minimum of $125 per month which will be increased to pension levels at age 62 in the attached tables effective on or after January 1, 1976.
5. Pensions for Widows of Pensioned Miners	50% of spouse's pension	Same
Death of Working Miner After Eligibility for Immediate Pension has been attained	50% of pension miner would have received had he retired on date of death	Same
6. Deferred Vested Pension		
Eligibility	10 years of service in coal mining industry	Same
Payable	At age 62 or an actuarially reduced pension at age 55	Same

COMPARISON OF LIFE INSURANCE BENEFITS

	AMAX Proposal	UMWA Proposal
1. Working miner with 1 to 5 dependents	$8500	$7500
2. Working miner with more than 5 dependents	$9000 plus additional $500 per dependent with maximum of $11,000	$7500 plus additional $500 per dependent with maximum of $10,000
3. Working miner with no dependents	$3000	$2000
4. Pensioned miner with no dependents	$3000	$2000
5. Pensioned miner with dependents	$3500	$2500
6. Accidental Death as a result of mine accident	Life insurance amount shown above for working miner plus $100 per month to spouse until her death or remarriage. If there is no surviving spouse, $100 per month payable to surviving children to age 22.	$10,000 plus $100 per month payable to spouse until her death or remarriage. If there is no surviving spouse, $100 per month payable to surviving children to age 22
7. Accidental Death off the job	Same benefits as accidental death as result of mine accident.	No benefits provided

Company Proposal
March 14, 1975

APPENDIX A

HOURLY AND DAILY WAGE RATES—8-HOUR SHIFT MINES

GRADE		EFFECTIVE DATE 3/ /75	3/ /76	3/ /77	CONCENTRATION OF CLASSIFICATIONS
6	HOURLY	8.23*	8.64*	9.00**	A. Coal Loading Shovel Operator
	DAILY	65.85*	69.14*	72.00**	B. Overburden Stripping Machine Oper.
					C. Master Electrician
5	HOURLY	7.94*	8.34*	8.67**	A. Electrician
	DAILY	63.54*	66.71*	69.38**	B. Machinist
					C. Mechanic
					D. Welder, First Class
4	HOURLY	7.65*	8.04*	8.36**	A. Shovel and Dragline Oiler
	DAILY	61.23*	64.29*	66.86**	B. Groundman
					C. Welder
					D. Mobile Equipment Operator II
3	HOURLY	7.26*	7.63*	7.93**	A. Repairman
	DAILY	58.12*	61.02*	63.46**	B. Stationary Equipment Operator
					C. Driller & Shooter
					D. Maintenance Trainee II (Max. 12 mos.
					E. Mobile Equipment Operator I
2	HOURLY	6.79*	7.13*	7.42**	A. Tipple Attendant
	DAILY	54.34*	57.06*	59.34**	B. Helpers
					C. Maintenance Trainee I (Max. 6 mos.

1	HOURLY	6.71*	7.05*	7.33**	A. Car Dropper
	DAILY	53.69*	56.38*	58.63**	B. Car Dumper
					C. Car Trimmer
					D. Sampler
					E. Truck Driver, Service
					F. Utility Man
					G. Laborer—Unskilled

* The cost-of-living adjustment applicable is to be paid to each Employee in addition to the Hourly and Daily Wages Rates provided for herein.

** The cost-of-living adjustment in effect on March , 1977, is to be added to the Hourly and Daily Wage Rates. Cost-of-living adjustments which occur after March , 1977, are to be paid in addition to the third year Hourly and Daily Wage Rates as adjusted in accordance with the preceding sentence.

For the Company .....

For the Union .....

Date .....

Company Proposal
March 14, 1975

APPENDIX A

HOURLY AND DAILY WAGE RATES—7¼-HOUR SHIFT MINES

GRADE		EFFECTIVE DATE 3/ /75	3/ /76	3/ /77	CONCENTRATION OF CLASSIFICATIONS
6	HOURLY	7.86*	8.26*	8.59**	A. Coal Loading Shovel Operator
	DAILY	57.00*	59.85*	62.24**	B. Overburden Stripping Machine Oper.
					C. Master Electrician
5	HOURLY	7.59*	7.97*	8.28**	A. Electrician
	DAILY	55.00*	57.75*	60.06**	B. Machinist
					C. Mechanic
					D. Welder, First Class
4	HOURLY	7.31*	7.68*	7.98**	A. Shovel and Dragline Oiler
	DAILY	53.00*	55.65*	57.88**	B. Groundman
					C. Welder
					D. Mobile Equipment Operator II
3	HOURLY	6.94*	7.29*	7.58**	A. Repairman
	DAILY	50.31*	52.83*	54.94**	B. Stationary Equipment Operator
					C. Driller & Shooter
					D. Maintenance Trainee II (Max. 12 mos.
					E. Mobile Equipment Operator I
2	HOURLY	6.49*	6.81*	7.09**	A. Tipple Attendant
	DAILY	47.04*	49.39*	51.37**	B. Helpers
					C. Maintenance Trainee I (Max. 6 mos.

1	HOURLY	6.41*	6.73*	7.00**	A. Car Dropper
	DAILY	46.48*	48.80*	50.76**	B. Car Dumper
					C. Car Trimmer
					D. Sampler
					E. Truck Driver, Service
					F. Utility Man
					G. Laborer—Unskilled

* The cost-of-living adjustment applicable is to be paid to each Employee in addition to the Hourly and Daily Wages Rates provided for herein.

** The cost-of-living adjustment in effect on March , 1977, is to be added to the Hourly and Daily Wage Rates. Cost-of-living adjustments which occur after March , 1977, are to be paid in addition to the third year Hourly and Daily Wage Rates as adjusted in accordance with the preceding sentence.

For the Company .....

For the Union .....

Date .....

APPENDIX A

CLASSIFICATION INDEX

CLASSIFICATION	JOB TITLE WITHIN CLASSIFICATION		
6-A Coal Loading Shovel Operator	Coal Loading Shovel Operator	Front End Loader—Coal	
6-B Overburden Stripping Machine Operator	Construction Mobile Crane Operator—Erection and Dismantlement	Dragline Operator Shovel Operator	Stripping Shovel Operator Wheel Operator
6-C Master Electrician	* Electrician Leader * Master Electrician	* Note: The electrician assigned to install electrical components and trouble-shoot electrical failures on electric shovels and draglines.	
5-A Electrician	Electrician Electrician, 1st Class	Electrician, Lineman	Tipple Electrician
5-B Machinist	Machinist	Machinist, 1st Class	
5-C Mechanic	Mechanic Mechanic, Garage Mechanic, 1st Class	Prep, Plant Mechanic Shop Mechanic	Truck Mechanic Truck & Tractor Mechanic
5-D Welder, 1st Class	* Welder, 1st Class * Welder Leader	* Note: Performing any welding work required, including vertical, overhead, and flat welding in accordance with approved standards.	
4-A Shovel & Dragline Oiler	Coal Loading Shovel Oiler Coal Stripping Shovel Oiler	Dragline Oiler Shovel Oiler	Shovel Oiler, Overburden Wheel Oiler
4-B Groundman	Groundmen Around Shovel	Groundmen on Wheel	
4-C Welder	Tipple Welder	Welder	Welder, 2nd Class

APPENDIX A

CLASSIFICATION INDEX

CLASSIFICATION	JOB TITLE WITHIN CLASSIFICATION		
4-D Mobile Equipment Operator II	Carryall Operator Dozer Operator (Rubber Tired and Crawler)	Front End Loader Grader Operator Le Tourneau Operator (Pan)	
3-A Repairman	Blacksmith Car Repairman Carpenter	Electrician, 2nd Class Machine Repairman Mechanic, 2nd Class	Plumber Repairman
3-B Stationary Equipment Operator	Auger Operator Boom Operator Dryer Operator Plant Operator	Retarder Man Retarder Operator Rock Crusher Operator Tipple Fireman	Tipple Operator Tipple Washer Operator Unit Train Loader Operator
3-C Driller & Shooter	Coal Driller Coal Shooter Drill Operator	Tampman Driller & Shooter	Shooter on Overburden Driller
3-D Maintenance Trainee II (Max. 12 mos.)	Maintenance Trainee II (Max. 12 mos.)	Electrician Trainee II (Max. 12 mos.)	
3-E Mobile Equipment Operator I	Haulage Trailer Operator Heavy Equipment Operator Payloader Operator Reclamation Tractor Operator Tractor Operator Truck Driver, Coal	Truck Driver, Overburden Truck Driver, Haulage High Lift Operator Hydraulic Equipment Oper. Locomotive Fireman Locomotive Operator	Low Boy Operator Mobile Crane Operator Semi-Tractor Driver Water Truck Driver (Sprinkler) Farm-Type Tractor Operator
2-A Tipple Attendant	Tippleman	Switchman	

2-B	Helpers	Electrician Helper Mechanic Helper Mechanic Helper, Mach. Shop Truck Mechanic Helper	Machinist Helper Greaser Serviceman Machinist, 2nd Class	Truck Oiler Welder Helper Tipple Oiler Beltman
2-C	Maintenance Trainee I (Max. 6 Mos.)	Maintenance Trainee (Max. 6 Mos.)	Electrician Trainee (Max. 6 Mos.)	
1-A	Car Dropper	Car Dropper	Trip Rider	
1-B	Car Dumper*	Dumper	* Note: A Car Dumper Operator shall be paid at the Job Class 3 Rate of pay when equipment is being operated to dump the car.	
1-C	Car Trimmer	Car Trimmer		
1-D	Sampler	Coal Sampler		
1-E	Truck Driver, Service	Supply Truck Driver Truck Driver	Truck Driver, Outside Pit	Truck Driver, Utility
1-F	Utility Man	Maintenance, Misc. Painter Preparation Man	Track Repairman Trackman Utility Man Water Carrier	Water Treater Driller Helper Pumper
1-G	Laborer—Unskilled	Car Cleaner Flagger Janitor Laborer Nitrate Bagger	Pit Hand Shoveler Pit Man Shop Laborer Slate Picker Tipple, All Other	Tipple Laborer Track Labor Yardman Auger Helper Shooter Helper

For the Company .....

For the Union .....

JOINT EXHIBIT 7(z)

W U
western union Telegram

DVB340(1708)(1-033101C006)PD 01/06/75 1706
TWX UMWA WASH
002 WASH DC 1 6 75
PMS MR. JOSEPH A. YABLONSKI
GENERAL COUNSEL
UNITED MINE WORKERS OF AMERICA
C/O DOWNTOWN HOLIDAY INN
15TH AND GLENARM PLACE
DENVER, COLORADO 80202

TEL: 303 573 1450

PLEASE BE ADVISED THAT THE FOLLOWING TELEGRAM WAS TRANSMITTED BY ME TODAY TO THE RECORDING SECRETARIES OF ALL LOCAL UNIONS REPRESENTING EMPLOYEES COVERED BY THE SUB-BITUMINOUS AND LIGNITE AGREEMENTS:

W U
western union Telegram

DEAR BROTHER:

NEGOTIATIONS WITH WESTERN SURFACE OPERATORS ARE IN PROGRESS IN DENVER, COLORADO. A FIRM DEADLINE OF JANUARY 12, 1975 HAS BEEN SET. UNLESS YOU ARE INSTRUCTED OTHERWISE, PLEASE CEASE ALL OPERATIONS AT 12:01 A.M., JANUARY 12, 1975.

FRATERNALLY,

MIKE TRBOVICH
NNNN

JOINT EXHIBIT 4(b)

UMWA 1974 PENSION PLAN

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UNITED MINE WORKERS OF AMERICA
1974 PENSION PLAN
EFFECTIVE DECEMBER 6, 1974

ARTICLE I—INTRODUCTION

Pursuant to Article XX of the Wage Agreement, the United Mine Workers of America 1974 Pension Plan (hereinafter referred to as the "Plan"), provides pension benefits as hereinafter set forth. The provisions of the Plan are effective December 6, 1974, (the "effective date") and are set forth below. Except in the case of total disability resulting from mine accidents occurring after the effective date, this Plan does not provide benefits to persons retiring on or before December 31, 1975, but such persons may be entitled to pension benefits under the United Mine Workers of America 1950 Pension Plan (hereinafter referred to as the "1950 Pension Plan").

A. *Definitions*

(1) "Wage Agreement" means the National Bituminous Coal Wage Agreement of 1974, as amended from time to time and any successor thereto. Any reference in this Plan to the Wage Agreement or to the bituminous coal wage agreement then in effect shall also refer (a) to the Sub-bituminous and Lignite Agreement and the National Coal Mine Construction Agreement with respect to any period for which such agreements provide that pension benefits shall be made available pursuant to this Plan or a predecessor plan established under the bituminous coal wage agreement, and (b) with respect to any period prior to the 1950 Bituminous Coal Wage Agreement, to any collective bargaining contract between the United Mine Workers of America and any employer in the bituminous coal industry.

(2) "Employer" means an employer who is signatory to the Wage Agreement, or, with respect to prior periods,

is signatory to the bituminous coal wage agreement then in effect.

(3) "Participant" means any person who is employed in a classified job for an Employer after the effective date and any person entitled to receive pension benefits under the Plan; provided, however, that any person who is not employed in a classified job for an Employer on the effective date shall not become a participant unless he obtains at least one year of credited service after the effective date, or unless he is subject to the provisions of Article II (F) (3).

(4) "1974 Pension Trust" means the trust established pursuant to the Wage Agreement to fund this Plan.

(5) "Trustees" means the Trustees of the 1974 Pension Trust, who shall be named fiduciaries pursuant to Section 402 of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"); provided, however, that the 1974 Pension Trust may be amended to designate other or additional named fiduciaries under said Trust and the Plan.

(6) "Credited Service" means signatory and nonsignatory service determined pursuant to Article IV.

B. *When Retirement Occurs*

For the purposes of this Plan, in the case of any participant, retirement shall be considered to occur on the last day of credited service, provided that on such day he was eligible for an immediate or deferred pension under this Plan.

ARTICLE II—ELIGIBILITY

A. *Age 55 Retirement*

Any participant who (a) has at least 10 years of signatory service or at least twenty years of credited service, including the required amount of signatory serv-

ice as set forth in Article IV(C) (6), and (b) has attained the age of 55 years (but not the age of 62) prior to retirement shall be eligible to retire on or after December 31, 1975, and shall upon his retirment (hereinafter "Age 55 Retirement") be eligible for a pension.

B. *Age 62 Retirement*

Any participant who (a) has at least 10 years of signatory service or at least twenty years of credited service including the required amount of signatory service as set forth in Article IV(C) (6), and (b) has attained the age of 62 years prior to retirement, shall be eligible to retire on or after December 31, 1975, and shall upon his retirement (herinafter "Age 62 Retirement") be eligible for a pension. Age 62 shall be considered the normal retirement age for purposes of ERISA or other applicable laws.

C. *Disability Retirement*

A participant who (a) has at least 10 years of signatory service prior to retirement, and (b) becomes totally disabled on or after the effective date as a result of a mine accident shall, upon his retirement (hereinafter "Disability Retirement"), be eligible for a pension. A participant shall be considered to be totally disabled only if by reason of such accident he is subsequently determined to be eligible for Social Security Disability Insurance Benefits under Title II of the Social Security Act or its successor.

D. *Minimum Disability Retirement*

Any participant who (a) has less than 10 years of signatory service prior to retirement and (b) becomes totally disabled on or after the effective date as the result of a mine accident shall, upon his retirment (hereinafter "Minimum Disability Retirement"), be eligible for a pension. A participant shall be considered to be

totally disabled only if by reason of such accident he is subsequently determined to be eligible for Social Security Disability Insurance Benefits under Title II of the Social Security Act or its successor.

E. *Deferred Vested Retirement*

Any participant not eligible to receive a pension under any other provision of this Article II whose employment in a classified job with an Employer is terminated after December 31, 1975, for any reason and who at the time of retirement (or, if later, at the time of termination of employment with an Employer) has (a) at least 10 years of signatory service, or (b) at least 20 years of credited service including the required amount of signatory service as set forth in Article IV(C) (6) shall be eligible for a pension (hereinafter "Deferred Vested Pension"), upon attaining age 62, or, at the election of the participant, he shall be eligible for a reduced pension beginning at any time after he attains age 55. At the time of such termination, such participant shall be given an appropriate written notice of his eligibility and other relevant data.

F. *Nonduplication*

(1) A participant shall be entitled to receive a pension under only one of the foregoing paragraphs of this Article II with respect to any retirement.

(2) Except as provided in paragraphs (C), (D), or (F) (3) of this Article II, any person whose retirement occurs on or before December 31, 1975, shall not be entitled to receive pension benefits under this Plan, but shall be entitled only to receive such benefits as may be provided under the 1950 Pension Plan.

(3) Any person who (a) retires on or before December 31, 1975, (b) at the time of retirement is entitled to or, upon attaining age 55 would be entitled to, a pension benefit under the 1950 Pension Plan, and (c) is

again employed in a classified job for an Employer after December 31, 1975, shall upon his subsequent retirement (or, if later, upon attaining age 55) be eligible for a pension only under this Plan and not under the 1950 Pension Plan, in the amount hereinafter specified. The amount of pension for a participant described in this paragraph shall be the sum of the amount of pension to which such participant would be entitled upon attaining age 55 under the 1950 Pension Plan if he had not been employed in a classified job for an employer after December 31, 1975, plus the excess of (i) over (ii) where (i) is the pension to which such participant would be entitled except for this paragraph under Article III(A)(2) or III(B)(2) based upon all years of credited service under this Plan and (ii) is the pension to which such participant would be entitled under Article III(A)(2) or III(B)(2) based solely on his credited service prior to December 31, 1975.

G. *Employment for Vesting Purposes*

For all purposes of this Article II, if any participant's signatory service shall be less than the total of his years of employment after May 28, 1946, for Employers then signatory to the bituminous coal wage agreement then in effect (hereinafter referred to as "employment" for purposes of this Article), then such years of employment shall be used for purposes of any eligibility requirement of minimum signatory service under this Article in place of years of signatory service. Years of employment shall be computed by giving credit for one year of employment for any year for which the participant completed 1,000 hours of employment; provided that no credit shall be given for any year in which the participant completed less than 1,000 hours of employment; and provided further that (a) all years of employment before age 22 shall be disregarded, (b) all years of employment before January 1, 1971, shall be disregarded unless the participant completed at least 3 years of employment after

December 31, 1970; and (c) years of employment prior to any break in service shall be disregarded to the maximum extent permissable under section 203(b)(3) of ERISA. The provisions of this paragraph shall be interpreted and construed in accordance with the requirements of ERISA and the regulations issued thereunder.

ARTICLE III—AMOUNT OF PENSION

A. *Retirement in 1976*

A pension granted to a participant who retires on and after December 31, 1975 (the effective date, with respect to disability retirement and minimum disability retirement), but prior to January 1, 1977 pursuant to Article II shall consist of a pension amount payable in monthly installments provided in accordance with the provisions of this Article III as set forth below.

(1) *Age 55 Retirement Pension*

(a) a deferred pension, commencing after attainment of age 62, computed under the provisions of paragraph 2 below; or, at the election of the participant,

(b) an immediate pension, equal to the deferred pension to which he would have been eligible under (a) above had he so elected, reduced by ¼ of one percent (1%) for each full month (3 percent (3%) per year) between the date on which pension benefits began and the date on which participant attains age 62.

(2) *Age 62 Retirement Pension*

The amount of pension for Age 62 Retirement shall be determined as follows:

(a) for each year of credited nonsignatory service as defined herein, $7.50 per month;

(b) for each of the first 10 years of credited signatory service, $12.00 per month;

(c) for each year of credited signatory service in excess of 10 years but not to exceed 20 years, $12.50 per month;

(d) for each year of credited signatory service in excess of 20 years but not to exceed 30 years, $13.00 per month;

(e) for each year of credited signatory service in excess of 30 years, $13.50 per month.

Proportional credit shall be allowed for any fractional years of credited service pursuant to Article IV hereof.

(3) *Disability Retirement Pension*

For a participant whose disabling accident occurs after the effective date but prior to January 1, 1976, the pension payment shall be $125.00 per month. Effective January 1, 1976, such a participant's pension payment, subject to a minimum payment of $125.00 per month, shall be computed under the provisions of paragraph (2) above.

For a participant whose disabling accident occurs on and after January 1, 1976, the pension payment shall be computed under the provisions of paragraph (2) above.

(4) *Minimum Disability Retirement Pension*

The amount of pension for Minimum Disability Retirement shall be $125.00 per month.

(5) *Deferred Vested Pension*

The amount of a deferred vested pension shall be a pension, commencing on or after attainment of age 62, computed under the provisions of Subsection A(2) of this Article III or, at the participant's election, between ages

55 and 62 with the pension payable reduced to its actuarial equivalent pursuant to Appendix A; provided, however, that in the case of any participant with at least twenty (20) years of credited service, such pension shall not be reduced to less than $150.00 per month.

B. *Retirement in 1977*

A pension granted to a participant who retires on or after December 31, 1976 pursuant to Article II shall consist of a pension amount payable in monthly installments provided in accordance with the provisions of this Article III as set forth below.

(1) *Age 55 Retirement Pension*

(a) a deferred pension, commencing after attainment of age 62, computed under the provisions of paragraph 2 immediately below; or, at the election of the participant, (b) an immediate pension, equal to the deferred pension to which he would have been eligible under (a) above had he so elected, reduced by ¼ of one percent (1%) for each full month (three percent (3%) per year) between the date on which pension benefits began and the date on which the participant attains age 62.

(2) *Age 62 Retirement and Disability Retirement Pension*

The amount of pension for Age 62 Retirement or Disability Retirement, subject to a minimum pension of $125.00 per month for Disability Retirement, shall be determined as follows:

(a) for each year of credited nonsignatory service as defined herein, $7.50 per month;

(b) for each of the first 10 years of credited signatory service, $12.50 per month;

(c) for each year of credited signatory service in excess of 10 years but not to exceed 20 years, $13.00 per month;

(d) for each year of credited signatory service in excess of 20 years but not to exceed 30 years, $13.50 per month;

(e) for each year of credited signatory service in excess of 30 years, $14.00 per month.

Proportional credit shall be allowed for any fractional years of credited service pursuant to Article IV hereof.

(3) *Minimum Disability Retirement Pension*

The amount of pension for minimum disability retirement shall be $125.00 per month.

(4) *Deferred Vested Pension*

The amount of a deferred vested pension shall be a pension, commencing on or after age 62, computed under the provisions of paragraph B(2) of this Article III, or, at the participant's election, between ages 55 and 62 with the pension payable reduced to its actuarial equivalent pursuant to Appendix A; provided, however, that in the case of any participant with at least twenty (20) years of credited service, such pension shall not be reduced to less than $150.00 per month.

C. *Increased Pension*

Effective as of January 1, 1977, the pension of any participant who retired under this Plan on or before December 31, 1976, and whose pension was computed under the provisions of A-1 and A-2 of this Article III shall be increased by $10.00 per month. This increase will not be applicable to those participants who are eligible for either a Minimum Disability Retirement Pension or who become eligible to receive a Deferred Vested Pension.

D. *Commencement, Suspension and Termination of Pensions*

Payments to pensions shall be subject to the following:

(1) The first payment on any pension shall be made for the month following the month in which the participant becomes eligible for a pension in accordance with Article II.

(2) The last payment shall be for the month in which the pensioner dies.

(3) Pension payments shall be payable on the first day of each month at the pensioner's last address of record.

(4) Pension payments shall be suspended for any month in which the pensioner is employed, subsequent to commencement of such payments, in the bituminous coal industry, in the same trade or craft, and in the same geographic area covered by this Plan. The geographic area covered by this Plan shall be the United States of America. The provisions of this paragraph shall be interpreted in accordance with any regulations issued pursuant to Section 203(a)(3) and (B) of ERISA.

(5) Any participant who continues to be employed by an Employer after his retirement shall not be entitled to receive pension benefits under this Plan until such time as he is no longer employed by an Employer.

ARTICLE IV—CREDITED SERVICE

A. *Nonsignatory Service*

Subject to the limitations in paragraph C of this Article IV, credited service is a period during which the participants meets the requirements of subparagraphs (1), (2), (3), (4) or (5) below. Any credited service shall be nonsignatory service unless it qualifies as signatory service pursuant to Article IV (B) hereof.

(1) A participant shall receive credit for a year of service for any year in which he worked, subsequent to

December 31, 1936, as an employee in a job classified in the then existing bituminous coal wage agreement for an employer in the coal industry for at least 1,000 hours of service, with credit given for the next lowest ¼ year in the event any employee works less than 1,000 hours of service as follows:

750—999 hours, ¾ year

500—749 hours, ½ year

250—499 hours, ¼ year

249 hours or less, 0

With respect to any period of such service for which records of hours of service are not available or it is not feasible in light of the administrative and cost difficulties involved to compile a record of hours of service, an applicant shall be deemed to have worked a thousand hours of service if he received wages in an amount equal to the product of (i) the lesser of 125 days or ½ the average number of days the bituminous mines in the United States were active, multiplied by (ii) the daily basic rate paid in the bituminous coal industry for that year; provided that for any year for which information is not available as to the average number of days the mines were active, the available data for the nearest year next preceding shall be used; provided further that if an applicant earned less than the minimum amount required for a year of service, credit for service shall be given to the next lowest ¼ year in the manner indicated with respect to hours of service.

(2) A participant shall receive credit for a year of service for any calendar year in which he worked, prior to January 1, 1937, as an employee in a job classified in the then existing coal wage agreement for an Employer in the bituminous coal industry, in a minimum of at least six (6) months during a calendar year, provided that if the applicant worked in less than six (6) months, credit for service shall be awarded to the next lowest one-fourth

(¼) year, based upon service in six (6) months equalling a year's service.

(3) A participant shall receive credit for a year of service for any year in which he received state workmen's compensation payments pursuant to an award as a result of an occupational disease or injury sustained in the mine while regularly employed in a classified job under the bituminous coal wage agreement then in effect, provided; in the case of occupational disease, the participant had been so employed by an Employer signatory to the Wage Agreement then in effect for at least ten (10) years after May 28, 1946. Credit shall be given up to a maximum of four (4) years service credit from date of injury, or from the date of last employment in case of occupational disease provided the participant did not work regularly during the compensable period. Benefits awarded pursuant to the Federal Coal Mine Health and Safety Act of 1969 shall be deemed "state workmen's compensation payments" within the meaning of this section, only if the miner was last regularly employed in the coal industry after the enactment date of the Act, December 30, 1969, in a classified job under the bituminous coal wage agreement then in effect, and had been so employed by an operator signatory to the agreement for at least ten (10) years after May 28, 1946. In no event shall any service be credited under this paragraph A-3 with respect to periods after the effective date.

(4) A participant shall receive credit for a year of service for any year in which he rendered service as an employee of the United Mine Workers of America in the coal industry immediately following regular employment in a classified job under the bituminous coal wage agreement then in effect; provided that the participant returned to work in a clasified job within twelve (12) months after the date of his last employment by United Mine Workers of America; and provided further that the participant is not covered by the pension or retirement plan of the United Mine Workers of America. Service

credit for such period shall be computed in the same manner as credit is computed for service prior to 1937, as described in paragraph 2 hereof.

(5) A participant shall receive credit for a year of service for any year in which he served in the military service of the United States in any war, national emergency, or international police action, immediately following regular employment in a classified job under the bituminous coal wage agreement then in effect, provided that credit for such service shall be limited to the original period of enlistment or obligated military service; and provided further that the participant returned to work in a classified job within twelve (12) months after his date of separation from the military service, unless he was precluded from doing so by service connected sickness, accident, or other disability, and returns to work in a classified job when no longer precluded by such disability. Service credit for the period of military service shall be computed in the same manner as credit is computed for service prior to 1937, as described in paragraph 2 above.

B. *Signatory Service*

Credited signatory service is:

(1) Service as defined in paragraph A(1) hereof during which a participant worked as an employee in a classified job for an Employer signatory to the bituminous coal wage agreement then in effect.

(2) Service prior to the effective date as defined in paragraph A(3) hereof during which a participant received state workmen's compensation payments if such payments are pursuant to an award as a result of an occupational disease or injury awarded after May 28, 1946, and if the participant was last regularly employed prior to such service as an employee in a classified job for an Employer signatory to the bituminous coal wage agreement then in effect.

(3) Service during which a participant receives weekly Sickness and Accident Benefits pursuant to Article XI of the Wage Agreement.

(4) Service as defined in paragraph A(5) hereof during which a participant served in the military service of the United States, provided that the classified employment referred to therein (both before and after military service) is for an Employer signatory to the bituminous coal wage agreement then in effect and provided further, however, that for military service credited after December 31, 1974, the participant returned to work in a classified job within ninety (90) days after his date of separation from the military service or such longer period as may be allowed by law.

(5) Service (within the meaning of paragraph A (1) hereof) by an employee in a classified job for an Employer not signatory to the bituminous coal wage agreement then in effect if (i) such service is continuous, (ii) such Employer becomes a signatory to the bituminous coal wage agreement after the effective date as a result of recognizing the UMWA as the bargaining representative for its employees, (iii) the employee is working in a classified job with such Employer at the time such Employer becomes signatory to the bituminous coal wage agreement, and (iv) such employee remains in a classified job with such Employer during the twenty-four month period immediately following the date on which such Employer becomes signatory to the bituminous coal wage agreement; provided, however, that not more than ten (10) years of nonsignatory service may be recognized or awarded as signatory service to any person pursuant to this paragraph (5).

C. *Additional Rules Concerning Credited Service*

(1) Except as provided in Article IV(B)(5), employment after April 1, 1971 will not constitute credited

service under paragraph A-1 hereof unless such employment was in a classified job for an Employer.

(2) An applicant shall not be credited with more than one year of service for any calendar year by reason of any combination of the rules of this Article IV.

(3) The maximum number of years of nonsignatory service which may be included in the credited service of any participant retiring after December 31, 1981 shall be the number of years by which twenty years exceeds such participant's signatory service, but not in excess of ten years.

(4) No credit for service shall be awarded a participant for any period in which he was directly connected with the ownership, operation or management of a mine; provided, however, that in the case of any participant who received credit for such service before July 1, 1974 under the terms of the Pension Plan established under the United Mine Workers of America Welfare and Retirement Fund of 1950, credit shall be awarded for any period prior to July 1, 1975, in which the participant worked as an employee in a classified job in a mine in which he had no controlling interest, as a member of a cooperative or gang-working crew which shared the profits and losses, and which was operated under the bituminous coal wage agreement then in effect; and, provided further, that in the case of a participant who received credit for service before July 1, 1974, under the terms of the Pension Plan established under the Mine Workers of America Welfare and Retirement Fund of 1950, credit for signatory service shall be awarded for any period prior to July 1, 1975 during which such participant worked in a classified job pursuant to an agreement to produce coal for a signatory coal company which exercised control over the operation of the mine and was responsible for royalty payments on such coal produced to the 1974 Pension Trust or its predecessor.

(5) The following maximum years of nonsignatory service may be included in credited service under this Plan:

Date of Retirement	Maximum Years of Nonsignatory Service
Prior to December 31, 1976	15
January 1, 1977 to December 31, 1977	14
January 1, 1978 to December 31, 1978	13
January 1, 1979 to December 31, 1979	12
January 1, 1980 to December 31, 1980	11
January 1, 1981 and thereafter	10

(6) A participant with less than ten years of signatory service shall not be entitled to receive a pension under paragraph (A), (B) or (E) of Article II unless such participant has at least twenty years of credited service, including at least the following minimum number of years of signatory service:

Date of Retirement	Years of Signatory Service Required
Prior to December 31, 1976	Five (5) Years
January 1, 1977 to December 31, 1977	Six (6) Years
January 1, 1978 to December 31, 1978	Seven (7) Years
January 1, 1979 to December 31, 1979	Eight (8) Years
January 1, 1980 to December 31, 1980	Nine (9) Years
January 1, 1981 and thereafter	Ten (10) Years

(7) Except as provided in Article V, service credits shall not be accrued subsequent to the effective date of pension payments.

(8) In the case of any participant, the last day of credited service shall be the last day on which the participant works as an employee in a classified job for an Employer, unless such participant continues to accrue credited service during the period for which he receives weekly sickness and accident benefits pursuant to Article XI of the Wage Agreement, in which case the last day of credited service shall be the last day for which such sickness and accident benefits are paid.

(9) An employee who is regularly employed in a classified job for an Employer and who performs supervisory duties on a temporary basis for not more than 120 work days during any consecutive period of 12 months shall be deemed to be employed in a classified job during the days on which he performs such supervisory duties.

ARTICLE V—REEMPLOYMENT AFTER ATTAINMENT OF PENSION ELIGIBILITY

A. Any participant who has been retired and receiving a pension under this Plan and who shall be reemployed in a classified job by an Employer shall, for the purpose of calculating any subsequent pension benefits to which he may become entitled, upon his subsequent retirement, be granted a pension equal to the sum of the pension he was previously receiving plus the excess of (i) over (ii) where (i) is the pensior to which such participant would be entitled at the time of such retirement, based upon all years of credited service under the Plan and (ii) is the pension to which such participant would be entitled at the time of such retirement, based solely on his credited service at the time of his previous retirement.

B. Any participant eligible for a deferred vested pension under this Plan who shall be reemployed in a classified job by an Employer prior to the commencement of

pension benefits shall, for the purpose of calculating any subsequent pension benefits to which he may become entitled, be granted his credited service applicable to the deferred vested pension plus his credited service accrued after such reemployment.

C. Any participant who is reemployed in a classified job by an Employer after attainment of eligibility for a deferred vested pension under this Plan, whose employment is subsequently terminated and who at that time is not eligible for a pension under any provision of Article II by reason of Article IV(C)(6), shall be considered to be eligible for the deferred vested pension for which he was eligible prior to such reemployment and upon application for pension the date of his retirement shall be considered to be the date of retirement which would, upon application for pension, have been applicable to the deferred vested pension for which he was eligible prior to such reemployment.

ARTICLE VI—SURVIVING SPOUSE BENEFIT

A. (1) Except as provided in paragraph (B), there is hereby provided a Surviving Spouse Benefit for any participant who (a) has retired and is receiving a pension under this Plan, except a participant receiving a deferred vested pension who has not completed at least twenty years of credited service, (b) has not retired but at the date of his death otherwise met the eligibility requirements for an immediate pension under Article II(A), (B), (C) or (D) under this Plan, and (c) is over age 55 with at least twenty years of credited service and who has retired and is entitled to elect an immediate pension under Article II(A) or II(E) at the date of his death.

(2) The amount of such benefit shall be equal to 50% of the amount of the participant's pension at the time of his death or, in the event the participant dies after age 55 at a time when he was eligible to elect a pension or

to retire and receive a pension under Article II, but prior to his receipt of a pension, 50% of the amount of the pension he would have received if he had elected a pension or retired and become entitled to a pension as of the date immediately preceding the date of his death.

(3) The Surviving Spouse Benefit will not be effective unless the participant and his spouse have been married throughout the nine-month period ending on the date of the participant's death or unless such nine-month requirement would be waived for purpose of determining entitlement to widow's insurance benefits under the Social Security Act.

(4) Payment to an eligible spouse will commence as of the first of the month following the month in which the participant's death occurs and the final payment shall be made for the month in which the spouse's death occcurs.

B. (1) Any participant who is not employed in a classified job for an Employer on the effective date is not covered for a Surviving Spouse Benefit under this Article unless (a) he obtains at least three years of credited service after the effective date, (b) he had ceased to be employed in a classified job as a result of (1) layoff, (ii) nonoccupational disability or accident, or (iii) occupational injury for which he was receiving workmen's compensation, or (c) he dies at a time when he is employed in a classified job for an Employer.

(2) Any participant who retires on or before December 31, 1975, and is again employed in a classified job for an Employer after such retirement, is not covered for a Surviving Spouse Benefit under this Article unless (a) he obtains at least three years of credited service after such retirement, or (b) such retirement resulted from (i) layoff, (ii) nonoccupational disability or accident, or (iii) occupational injury for which workmen's compensation benefits were awarded, or (c) he dies at a time when he is employed in a classified job for an Employer.

ARTICLE VII—JOINT AND SURVIVOR ANNUITIES

A. Notwithstanding any other provision of this Plan, if a participant qualifies for a pension under this Plan but is not covered for a surviving spouse benefit, the pension benefit otherwise provided to such participant shall be reduced actuarially pursuant to Appendix B and 50% of such reduced pension benefit will be continued, after the death of the participant, for the life of any qualified surviving spouse; provided, however, that such participant shall have a reasonable period before the starting date of his pension benefit to elect not to take a joint and survivor annuity as provided for in this Article and instead to receive a pension benefit for his life only which shall be computed pursuant to Appendix A and shall be the actuarial equivalent of the joint and survivor annuity computed under Appendix

B. Prior to the exercise of an election under this paragraph, the participant must be provided with a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election not to receive such annuity. In the event a participant elects not to receive a joint and survivor annuity, such election shall not become effective if the participant dies within a period of two years beginning on the date of such election. A qualified surviving spouse shall be any spouse who has been married to the participant for at least nine months prior to his death, unless such nine-month requirement would be waived for purposes of determining entitlement to widow's insurance benefits under the Social Security Act.

In the event that a participant who was subject to this Article and who was entitled to elect to receive a pension benefit shall die prior to receipt of a pension, his qualified surviving spouse shall be entitled to receive a survivor's benefit in the form of an annuity for life in an amount equal to 50% of the pension benefit the decedent

would have received if he had elected to receive a pension beginning on the date immediately preceding the date of death.

Payment to a qualified surviving spouse under this Article will commence as of the first of the month, following the month in which the participant's death occurs and the final payment shall be made for the month in which the spouse's death occurs.

ARTICLE VIII—MISCELLANEOUS

A. *Determination of Eligibility*

The Trustees or such other named fiduciaries as may be properly designated shall have full and final determination as to all issues concerning eligibility for benefits.

B. General

(1) The Trustees are authorized to promulgate rules and regulations to implement this Plan, and those rules and regulations shall be binding upon all persons dealing with and participants claiming benefits under this Plan.

(2) No benefit payable under this Plan shall be subject in any way to alienation, sale, transfer, assignment, pledge, attachment, garnishment, execution, or encumbrance of any kind, and any attempt to accomplish the same shall be void.

(3) This Plan may be amended pursuant to the provisions of Article XX of the Wage Agreement or may be terminated during the life of the Wage Agreement by agreement of the parties thereto, provided, however, that:

(a) this Plan shall not be amended or terminated in such a manner as would cause or permit any part of the assets in the 1974 Pension Trust to be diverted to purposes other than the exclusive benefit of the participants and their beneficiaries; (b) this Plan shall not be amended to deny to a participant retroactively any benefits to which he was entitled under this Plan, unless such amendment is necessary to

conform this Plan to, or to satisfy the conditions of any law, governmental regulations or ruling.

(4) Upon the termination of this Plan or the complete discontinuance of contributions to the 1974 Pension Trust, this Plan shall remain in force and effect for the period necessary to complete the payment of benefits in accordance with the terms of this Plan to the extent assets in the 1974 Pension Trust are available to pay such benefits.

(5) Forfeitures arising from the operation of the Plan shall not be used to increase the benefits which otherwise would be received under this Plan.

(6) Any participant or beneficiary whose claim for benefits under this Plan has been denied shall be (a) provided with adequate notice in writing setting forth the specific reasons for such denial, which notice shall be written in a manner calculated to be understood by the participant, and (b) afforded a reasonable opportunity for a full and fair review of the decision denying the claim by an appropriate named fiduciary or a person properly designated to carry out such responsibility.

(7) The Trustees are hereby authorized to allocate fiduciary responsibilities in any manner permitted pursuant to section 405(c) of ERISA and to appoint an investment manager or managers as permitted by section 402(c) of ERISA.

(8) Contributions to the 1974 Pension Trust to fund the benefits under this Plan shall be paid solely by the Employers in accordance with Article XX of the Wage Agreement.

APPENDIX A

Actuarial Equivalence Factors for Deferred Vested Retirement Benefits Commencing Prior to Age 62

The following factors are to be multiplied by the full accrued benefit payable commencing at normal retirement age 62 to yield the equivalent benefit payable commencing at the indicated age:

AGE		Actuarial Equivalence Factor	AGE		Actuarial Equivalence Factor
Yrs.	Mos.		Yrs.	Mos.	
55	0	.522	57	0	.621
	1	.526		1	.626
	2	.529		2	.631
	3	.533		3	.636
	4	.537		4	.641
	5	.541		5	.646
	6	.545		6	.651
	7	.549		7	.655
	8	.553		8	.660
	9	.557		9	.665
	10	.561		10	.675
	11	.565		11	.675
56	0	.569	58	0	.680
	1	.573		1	.685
	2	.577		2	.691
	3	.582		3	.696
	4	.586		4	.702
	5	.590		5	.707
	6	.595		6	.713
	7	.599		7	.718
	8	.604		8	.724
	9	.608		9	.729
	10	.612		10	.735
	11	.617		11	.740

APPENDIX A—Continued

AGE		Actuarial Equivalence	AGE		Actuarial Equivalence
Yrs.	Mos.	Factor	Yrs.	Mos.	Factor
59	0	.746	60	0	.820
	1	.752		1	.827
	2	.758		2	.834
	3	.765		3	.841
	4	.771		4	.848
	5	.777		5	.855
	6	.783		6	.863
	7	.789		7	.870
	8	.796		8	.877
	9	.802		9	.884
	10	.808		10	.891
	11	.814		11	.898
61	0	.905			
	1	.913			
	2	.920			
	3	.928			
	4	.936			
	5	.944			
	6	.952			
	7	.960			
	8	.968			
	9	.976			
	10	.984			
	11	.992			
62	0	1.000			

Actuarial Basis: 95% of 1959-61 U.S. Total Male Population Mortality Table at 5% Interest.

APPENDIX B

TABLE OF PERCENTAGES TO BE APPLIED AGAINST PENSION PAYABLE TO PARTICIPANT UNDER JOINT AND SURVIVOR ANNUITIES

AGE OF PARTICIPANT

AGE OF SPOUSE	55	56	57	58	59	60	61	62
	%	%	%	%	%	%	%	%
50	85.1	84.2	83.3	82.3	81.2	80.2	79.1	77.9
51	85.6	84.7	83.7	82.7	81.7	80.7	79.6	78.5
52	86.0	85.1	84.2	83.2	82.2	81.2	80.1	79.0
53	86.5	85.6	84.7	83.7	82.8	81.7	80.7	79.6
54	86.9	86.1	85.2	84.3	83.3	82.3	81.2	80.1
55	87.4	86.6	85.7	84.8	83.8	82.8	81.8	80.7
56	87.9	87.1	86.2	85.3	84.4	83.4	82.4	81.3
57	88.3	87.5	86.7	85.8	84.9	84.0	83.0	81.9
58	88.8	88.0	87.2	86.4	85.5	84.5	83.6	82.6
59	89.3	88.5	87.7	86.9	86.0	85.1	84.2	83.2
60	89.7	89.0	88.3	87.4	86.6	85.7	84.8	83.8
61	90.2	89.5	88.8	88.0	87.2	86.3	85.4	84.5
62	90.7	90.0	89.3	88.5	87.7	86.9	86.0	85.1

Pension Payable to Surviving Spouse will be equal to 50% of the Participant's Pension as Reduced in Accordance with the above Table.

JOINT EXHIBIT 14(c)

UMWA 1974 PENSION TRUST

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UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST

Pursuant to Article XX of the Wage Agreement, there is hereby established a trust to be known as the "United Mine Workers of America 1974 Pension Trust" (hereinafter referred to as "1974 Pension Trust") for the purpose of making benefit payments pursuant to the provisions of the United Mine Workers of America 1974 Pension Plan. The provisions of said 1974 Pension Trust are effective December 6, 1974, and are as set forth below.

ARTICLE I

The following terms shall have the meanings herein set forth:

(1) "Wage Agreement" means the National Bituminous Coal Wage Agreement of 1974, as amended from time to time and any successor thereto. Any reference in this Trust to the Wage Agreement or to the bituminous coal wage agreement then in effect shall also refer (a) to the Sub-bituminous and Lignite Agreement and the National Coal Mine Construction Agreement with respect to any period for which such agreements provide that pension benefit payments shall be made available pursuant to this Trust or a predecessor Trust established under the bituminous coal wage agreement, and (b) with respect to any period prior to the 1950 Bituminous Coal Wage Agreement, to any collective bargaining contract between the United Mine Workers of America and any employer in the bituminous coal industry.

(2) "Employer" means an employer who is signatory to the Wage Agreement or, with respect to prior periods, was signatory to the bituminous coal wage agreement then in effect.

(3) "Plan" shall refer to the "United Mine Workers of America 1974 Pension Plan" established pursuant to Article XX of the Wage Agreement.

(4) "Trustees" shall mean the trustees of this Trust designated in accordance with the provisions of Article II hereof, who shall be the named fiduciaries required pursuant to Section 402 of the Employee Retirement Income Security Act of 1974 (hereinafter sometimes referred to as "ERISA"), provided, however, that this instrument may be amended pursuant to Article XI hereof to designate other or additional named fiduciaries.

(5) "UMWA" or "Union" shall mean the United Mine Workers of America.

ARTICLE II

The 1974 Pension Trust shall be administered by a Board of three Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the Union, and one of whom shall be a neutral party selected by the other two. The Union may remove for cause the Trustee appointed by it and the Employers may remove for cause the Trustee appointed by them. The neutral party may be removed for cause by the joint action of the Trustee appointed by the Union and the Trustee appointed by the Employers.

In the event of resignation, death, removal, inability or unwillingness to serve of the Trustee appointed by the Employers or the Trustee appointed by the Union, the Employers shall appoint the successor of the Trustee originally appointed by them, and the Union shall appoint the successor of the Trustee originally appointed by it. In the event of resignation, death, removal, inability or unwillingness to serve of the neutral Trustee, the Trustee appointed by the Employers and the Trustee appointed by the Union shall designate the successor neutral Trustee. In the event of a deadlock on the designation or agreement as to any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting parties hereto, or by petition by either of the contracting

parties hereto to the United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in Section 302(c) of the Labor-Management Relations Act, 1947.

The representative of the Employers on the Board of Trustees shall be C. W. Davis, Bluefield, West Virginia; the representative of the Union on said Board of Trustees shall be Harry Huge, Washington, D.C.; and Paul R. Dean, Washington, D.C., is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the 1974 Pension Trust.

It is agreed by the contracting parties hereto that the Trustees herein provided for or their duly appointed successors, shall serve for the duration of the Wage Agreement and as long thereafter as the proper continuation and administration of said Trust shall require.

The Trustee designated by the Union shall be the Chief Executive Officer and Chairman of the Trustees.

This Trust shall have its principal place of business in Washington, D.C., or such other place as may be determined by the Trustees.

ARTICLE III

The 1974 Pension Trust established with the Trustees hereunder is an irrevocable trust created pursuant to Section 302(c) of the Labor-Management Relations Act, 1947, which shall endure as long as the purposes for its creation shall exist. The 1974 Pension Trust consists of such sums of money and other property, acceptable to the Trustees as from time to time shall be held by or paid or delivered to the Trustees and such earnings, profits, and increments thereon as may occur from time to time. All such money and other property delivered to the Trustees and all investments and reinvestments made therewith or proceeds thereof and all earnings and profits thereon, less the payments which at the time of

reference shall have been made by the Trustees as authorized herein, are referred to herein as the "assets of the 1974 Pension Trust." The assets of the 1974 Pension Trust shall be held by the Trustees and dealt with in accordance with the express provisions of this instrument and the requirements of law.

The monies to be paid into the 1974 Pension Trust shall not in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, *i.e.*, the beneficiaries of said 1974 Pension Trust under the terms of this instrument.

ARTICLE IV

The Trustees, or such other persons as may be properly designated pursuant to Article IX hereof, are directed and authorized (a) to hold, to invest and to reinvest the assets of the 1974 Pension Trust as provided herein; (b) to pay monies from the 1974 Pension Trust in accordance with the terms of the Plan for the purpose of distributing the benefits payable under the Plan; and (c) to pay the cost of administration of the 1974 Pension Trust as hereinafter provided.

ARTICLE V

The Trustees, or such other persons as may be properly designated pursuant to Article IX hereof, shall have full discretionary powers of management and control, of sale and resale, in fee simple or otherwise, mortgage, lease, and pledge, of the assets of the 1974 Pension Trust, and shall not be restricted to investments in securities or property of the character now or hereafter authorized by law or rules of the United States District Court for the District of Columbia. The assets of the 1974 Pension Trust shall be invested and reinvested, without distinction between principal and income, in securities and other forms of property, including but not

limited to, real estate, corporate stocks (common and preferred), debentures, bonds and other obligations whether or not secured. The Trustees, or such other persons as may be properly designated pursuant to Article IX hereof, shall not be limited to the amount or type of any investment in relation to the amount or type of investments constituting the Trust as a whole, except as provided by ERISA.

The Trustees or such other persons as may be properly designated pursuant to Article IX hereof may, in their discretion, keep such portion of the assets of the 1974 Pension Trust in cash or cash balances as the Trustees may determine to be reasonably necessary to satisfy the current needs of the Trust.

ARTICLE VI

Neither by way of limitation nor in derogation, but in amplification of any powers granted herein, the Trustees, or such other persons as may be properly designated pursuant to Article IX hereof, are further authorized:

(1) To purchase, sell, exchange, convey, transfer or dispose of, and also to grant options with respect to, any property, whether real or personal, at any time held by them and to make any sale, private or public;

(2) To retain, manage, operate, repair, improve, develop, preserve, mortgage or lease for any period any real property interests or rights held by the Trustees upon such terms and conditions as the Trustees deem proper, either alone or by joining with others, using other trust assets for any of such purposes if by them deemed advisable; to modify, extend, renew, or otherwise adjust any or all of the provisions of any such mortgage or lease, including the waiver of rentals, if by them deemed advisable;

(3) To compromise, compound and settle any debt or obligations due from third persons to them or to third persons from them, as Trustees hereunder, and to reduce

the rate of interest on, to extend or otherwise modify, or to foreclose upon default or otherwise enforce, any such obligations;

(4) To vote in persons or by proxy and to give general or special proxies or powers of attorney, with or without power of substitution, on any securities or other investments held by them;

(5) To exercise any rights or options appurtenant to any securities or other property held by them for the conversion thereof into other securities or property, or to exercise any rights or options held by them to subscribe for or purchase additional securities or other property, and to make any and all necessary payments with respect to any such conversion or exercise;

(6) To join in, dissent from or oppose, the reorganization, recapitalization, consolidation, sale or merger of corporations or properties of which they may hold stocks, bonds or other securities or in which they may be interested, upon such terms and conditions as they may deem wise; to pay any expenses, assessments or subscriptions in connection therewith and to accept any securities or property (whether or not the Trustees would be authorized to then invest in such securities or property) which may be issued upon any such reorganization, recapitalization, consolidation, sale or merger, and thereafter to hold the same;

(7) To make, execute, acknowledge and deliver any and all deeds, leases, mortgages, assignments, documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(8). To enforce any right, obligation or claim in their absolute discretion and in general to protect in any way the interest of the Trust, either before or after default with respect to any such right, obligation or claim, and, in case they shall consider such action for the best interest of the Trust, in their absolute discretion to abstain from the enforcement of any right, obligation or claim and to abandon any property, whether real or personal, which at any time may be held by them;

(9) To borrow or raise money for the purpose of the Trust in such amount and upon such terms and conditions as in their absolute discretion they may deem advisable; and for any sums so borrowed to issue their promissory note as Trustees and to secure the repayment thereof by mortgaging or pledging all or any part of the Trust; and no person lending money to the Trustees shall be bound to see to the application of the money loaned or to inquire into the validity, expediency or propriety of any such borrowing;

(10) To employ suitable agents and counsel from time to time, and to pay them reasonable expenses and compension;

(11) To retain without liability for depreciation any securities or property at any time purchased and/or received by the Trustees as a part of the Trust;

(12) To do all acts which may be necessary to comply with any of the requirements of ERISA or any other federal law;

(13) To enter into any and all contracts and agreements for carrying out the terms of the Plan and the 1974 Pension Trust and for the administration of such Plan and Trust; and

(14) To do all acts which they may deem necessary or proper and to exercise any and all powers of the Trustees under this instrument under such terms and conditions as they may deem to be for the best interest of the Trust.

The Trustees may, in their sole discretion, cause the securities which from time to time may comprise the Trust, to be registered in their name as Trustees hereunder, or in the name of their nominee without disclosing the ownership thereof or to take and keep the same unregistered, and to retain them, or any part thereof, in such condition that they will pass by delivery.

ARTICLE VII

The expenses incurred by the Trustees in the performance of their duties hereunder, including reasonable compensation for the Trustees in accordance with Sec-

tion 408(c)(2) of ERISA, for agents, and for service of counsel rendered to the Trustees and expenses incident thereto, and all other proper charges and disbursements of the Trustees, including all taxes of any kind and all kinds whatsoever that may be levied or assessed under existing or future laws of any jurisdiction upon or in respect of the Trust hereby created or any money, property or securities forming a part thereof, shall be paid by the Trustees out of the Trust.

ARTICLE VIII

A Trustee shall not be liable for the making, retention, or sale of any investment or reinvestment made by him as herein provided; for any loss to or diminution of the Trust; or for anything done or omitted under this instrument, except for his own willful misconduct or lack of good faith, or any other action or omission for which personal liability is imposed under Part 4 of Subtitle B of Title I of ERISA. Any Trustee may consult with legal counsel concerning any questions which may arise with reference to his duties under this instrument, and, except as otherwise provided by ERISA, the opinion of such counsel shall be full and complete protection in respect to any action taken or suffered by such Trustee hereunder in good faith and in accordance with the opinion of such counsel.

ARTICLE IX

The Trustees, or such other persons as may be properly designated pursuant to Article IX hereof, shall keep accurate and detailed accounts of all investments, receipts, and disbursements and other transactions hereunder, and such accounts, books and records relating thereto shall be open to inspection and audit by the parties hereto and by the beneficiaries of the 1974 Pension Trust at all reasonable times at the offices of the 1974 Pension Trust. The Trustees, or such other persons as may be properly designated pursuant to this Article IX shall be responsible for providing participants and bene-

ficiaries under the plan with all information required to be furnished pursuant to the provisions of ERISA or the regulations promulgated thereunder.

The Trustees, or such other persons as may be properly designated pursuant to this Article IX shall be responsible for maintaining records sufficient to comply with any requirements of ERISA and for the filing of all reports with the Labor Department, Treasury Department, and Pension Benefit Guaranty Corporation which may be required by any provision of ERISA or the regulations issued thereunder, including the plan description and reports specified by Section 101(b). A copy of each document or report provided to plan participants or beneficiaries or filed by the Trustees pursuant to the requirements of ERISA shall be sent to the Employers and to the Union unless the right to receive such copy has been waived in writing. The Trustees are authorized to apply for permission to implement an alternative method of satisfying any of the requirements of this Article IX in accordance with Section 110 of ERISA, and, upon receiving the approval of the Labor Department for such alternative method, may utilize such method in lieu of the corresponding requirements of ERISA and of Article IX of this instrument.

Within 90 days following the close of each calendar year, or following the close of each such other annual period as may be adopted by the Trustees, and within 90 days after a Trustee ceases to be a Trustee as provided for in Article II hereof, the Trustees shall file with the Employers and the Union a written report setting forth in such form and detail as they may request the transactions effected by the Trustees during such calendar year or other annual period or during the period from the close of such calendar year or other annual period to the date on which such Trustee's tenure ceases. The annual report shall incorporate the report of an independent certified public accountant and shall be the same as required by Section 103 of ERISA unless the

Employers and the Union shall jointly request that additional or supplemental information be incorporated in the report which they receive. Upon the expiration of ninety (90) days from the date of any report to the Employers and the Union, the Trustees shall be forever released and discharged from any liability or accountability to anyone as respects the propriety of their acts or transactions shown in the aforementioned report except as otherwise provided by law or with respect to any acts or transactions as to which the Employers or the Union shall file written objections with the Trustees within such period of ninety (90) days.

The Trustees are hereby authorized to allocate fiduciary responsibilities in any manner permitted pursuant to Section 405(c) of ERISA.

The Trustees may appoint an investment manager or managers to manage any investments held uner this instrument as permitted by Section 402(c) of ERISA.

ARTICLE X

Any action of the Employers which may be required hereunder may be taken by those Employers who at the time are parties to the Wage Agreement and who represent fifty-one percent (51%) or more of the total contributions made to this Trust during the calendar year (or such shorter period which may have elapsed after the effective date of this Trust), previous to that in which the action is taken, and the Trustees shall be fully protected in acting in accordance with any action taken by such Employers.

ARTICLE XI

The Employers and the Union reserve the right at any time and from time to time to modify or amend in whole or in part any or all of the provisions of this instrument, without reopening or otherwise affecting the integrity of any other provision of the Wage Agreement,

by a written agreement between the Employers and Union, provided, however, that such modification or amendment does not permit any part of the corpus or income of the Trust to be used for, or diverted to, purposes other than for the sole and exclusive benefit of the participants and their beneficiaries, and provided further, that the Employers and the Union have delegated to the Trustees the authority and responsibility to make certain changes and amendments as set forth in Article XX(h)(5) of the Wage Agreement.

ARTICLE XII

Notwithstanding anything to the contrary contained in this instrument, or any amendment thereto, it shall be unlawful for any part of the 1974 Pension Trust, other than such part as is required to pay taxes and administrative expenses, to be used for, or diverted to, purposes other than for the sole and exclusive benefit of the participants and beneficiaries of the Plan. Monies held by the 1974 Pension Trust do not constitute a part of the deceased beneficiary's estate which can be claimed by his administrator, executor, or heirs, unless such person or persons are otherwise eligible under the terms and conditions of the Plan, nor are said monies equivalent to the proceeds of an insurance policy in which a beneficiary may be designated; and no participant or beneficiary of the Plan may, during his lifetime, assign, devise or will monies from this Trust, and any attempt so to do shall be void.

ARTICLE XIII

This instrument shall be construed, regulated and administered under the laws of the District of Columbia.

IN WITNESS WHEREOF, each of the parties signatory hereto, pursuant to proper authority, has caused this instrument, effective December 6, 1974, to be signed

by its proper officers or representatives in Washington, D.C., this ——— day of December, 1974.

UNITED MINE WORKERS OF AMERICA

_____

International President

_____

International Vice President

_____

International Secretary-Treasurer

BITUMINOUS COAL OPERATORS ASSOCIATION, INC.

_____

President

Company Proposal
March 14, 1975

Article XIX—*Welfare and Retirement*

Section (a) General Purpose

This article make provision for pension, group life insurance, survivor benefits, loss of time, and medical care for Employees covered by this Agreement and for the spouses and dependents of such Employees. The benefits to be provided are as set forth under separate Plans and a Pension Trust and an Insurance Contract described in Section (b) and (c) of this Article.

A summary of the benefits to be provided appears immediately following this Article.

The general purpose of the Plans established by this Article shall be to provide life insurance and health care for working and retired miners and their dependents; pensions for miners upon their retirement; and health care and financial support for eligible disabled miners, miners' widows and surviving dependents as provided by the Pension Trust and Insurance Contract and Plans established under this Article.

Section (b) Pension Trust

Effective January 12, 1975, the Company will establish a Pension Trust to be known as the AMAX Belle Ayr Mine Pension Trust. The pensions to be paid from this Pension Trust are as set forth in the Summary of Principal Provisions Health and Retirement Benefits, Section (1) through Section (6), which is incorporated in this Agreement.

The Company shall select a trustee to hold and invest the Fund in accordance with the terms of a trust agreement, a copy of which shall be made available to the Union upon written request. The Company may, from time to time, change the trustee then serving under the trust agreement. Any trustee designated hereunder how-

ever, shall be a bank, trust company or insurance company incorporated under the laws of the United States or any of the states thereof, and shall be qualified to operate thereunder.

The Fund shall be used to pay benefits as provided in the Plan. No part of the principal or income of the Fund shall, in any event, be used for or diverted to purposes other than those provided in the Plan, and no benefits shall be paid out of the Fund without prior authorization of the administrator.

It is the intention of the Company that the Pension Trust shall constitute an irrevocable trust and that no benefits or money payable from the Pension Trust shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and that any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void.

Section (c) Insurance Contract

The Company intends to contract with an insurance company admitted to do business in the State of Wyoming to provide the life insurance and welfare benefits set forth in the Summary of Principal Provisions Health and Retirment Benefits, Section (7), which is incorporated in this Agreement.

Section (d) Contributions by Employer

During the life of this Agreement the Company will contribute to the Pension Trust each year the amount based on acturial calculations to provide for current service benefits and to amortize any unfunded past service liabilitiets over a period not to exceed 30 years. The contributions will be calculated by a qualified Actuary who is a member of the Society of Actuaries for American Academy of Actuaries.

During the life of this Agreement, the Company will pay the premiums required by the insurance company to provide the life insurance and welfare benefits provided in this Agreement.

Section (e) Administration of the Pension Plan

The Plan shall be administered by an individual (hereinafter called the "administrator") appointed by the Company who shall serve without compensation from the Fund and who shall be empowered to employ the services of clerical or other office personnel, provided such services are also without compensation from the Fund. Said administrator shall administer this Plan in accordance with applicable provisions thereof, and his authority with regard to interpretation of said provisions shall be final and binding on the parties hereto.

The Company shall promptly notify the Union in writing of the appointment of the administrator of the Plan, and shall promptly notify the Union in writing in the event such appointment is rescinded and some other administrator is appointed.

The administrator shall have such powers only as are specifically provided herein, including the following:

a) To prescribe procedure to be followed by employees in filing applications for benefits and for furnishing of evidence necessary to establish employees' rights to such benefits;

b) To make determinations as to the rights established by the Plan of any employee applying for or receiving benefits because of retirement or permanent and total disability, and to afford any such employee dissatisfied with any such determination the right to a hearing thereon before the administrator;

c) To develop procedures for the establishment of credited service, as prescribed by the Plan, or employees; and after affording employees an opportunity to make objections with respect thereto, to establish such credited service conclusively in advance of retirement;

d) To obtain from the Company, the Union, the trustee, the actuary, and from the employees such

information as shall be necessary for proper administration of the benefit provisions of the Plan;

e) To prepare an annual statement of the aggregate assets, receipts and disbursements of the Fund and a report on the funding status of the Plan. Such annual report shall be prepared as quickly as practicable after January 1 of each year, and shall be made available to the Union and to such agencies of federal, state or local governments as may or subsequently be required;

f) To authorize the trustee to pay benefits from the Trust Fund in accordance with the Plan, and to establish necessary procedures therefor;

g) To approve and distribute in such manner as the administrator determines appropriate information explaining the Plan; and

h) To furnish the Company and the Union, upon request, such reports as are reasonable and appropriate.

Section (f) Miscellaneous Provisions

The Company intends after adequate notice and consultation with the Union, to make such changes in the Plans including any retroactive modifications or amendments, which shall be necessary:

a) to conform the terms of each Plan to the requirements of the Employee Retirement Income Security Act of 1974, or any other applicable federal law, and the regulations issued thereunder;

b) to obtain a determination letter from the Internal Revenue Service that the Pension Plan will meet the Requirements of Section 401 of the Internal Revenue Code;

c) to establish the deductibility for income tax purposes of any and all contributions made by the Company to the Pension Trust and insurance conpany;

d) to comply with all applicable court or government decisions or rulings.

SUMMARY OF PRINCIPAL PROVISIONS WELFARE AND RETIREMENT BENEFITS

(1) ELIGIBILITY FOR BENEFITS

All years of employment in the coal mining industry will be credited in determining a miner's *eligibility* for pension and welfare benefits. Years of employment in the coal mining industry means employment with the Belle Ayr Mine of the AMAX Coal Company or with a signatory employer contributing to the United Mine Workers of America Pension and Benefit Trusts.

(2) PENSIONS FOR MINERS WHO RETIRE AFTER THE EFFECTIVE DATE OF THIS AGREEMENT BUT PRIOR TO JANUARY 1, 1977:

A working miner who retires after the effective date of this Agreement but prior to January 1, 1977, and who is eligible for a pension under the terms of this Agreement will receive pension benefits based upon an entirely new Plan.

The earliest retirement age under this Plan will be 55. A miner may retire at 55 with 10 or more years of employment in the coal mining industry.

Pension credits under the new Plan are increased as a miner accumulates more years of employment. Benefits are also increased based based upon a miner's age at the time of retirement with maximum benefits payable to miners who retire at the of 62 or more. If a miner retires under this Plan after the effective date of this agreement but prior to January 1, 1977, benefit credits for employment in the coal mining industry are as follows:

$13.00 per month multiplied by the years of employment for the first 10 years of employment

$13.50 per month multiplied by the years of employment for the second 10 years of employment

$14.00 per month multiplied by the years of employment for the third 10 years of employment

$14.50 per month multiplied by the years of employment for each year over 30 years of employment

To estimate your pension under the terms of this new Plan, see the table on page 138-141

The benefit derived above will be reduced by any benefit the miner is entitled to receive from the United Mine Workers of America Pension Trusts.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50% of his pension until her death.

As a hedge against the anticipated increase in the cost of living, miners who retire after the effective date of the Agreement but prior to January 1, 1977, will receive a $10.00 per month increase in 1977.

(3) PENSIONS FOR MINERS WHO RETIRE IN 1977:

Benefits under the new Plan will be increased for miners retiring in 1977. Subject to the same terms as paragraph (2), the maximum benefit schedule applicable in 1977 will be as follows:

$13.50 per month multiplied by the years of employment for the first 10 years of employment

$14.00 per month multiplied by the years of employment for the second 10 years of employment

$14.50 per month multiplied by the years of employment for the third 10 years of employment

$15.00 per month multiplied by the years of employment for each year over 30 years of employment

If you retire in 1977, estimate your pension by referring to the table on page ——.

Upon the death of a miner receiving a pension under this new Plan, his widow will receive a pension equal to 50% of his pension until her death.

(4) PENSIONS FOR DISABLED MINERS:

A miner who becomes permanently and totally disabled as the result of a mine accident after the effective date of this Agreement will become eligible for pension benefits according to the following schedule:

(a) If a miner has LESS than ten years of employment in the coal mining industry at the time of his disabling accident, he will receive a $125 per month pension for life.

(b) If a miner has TEN years or more of employment in the coal mining industry at the time of his disabling accident, he will receive an increased pension based upon the years of employment which he has accumulated at the time of his disabling accident. If the disabling accident occurs after the effective date of this Agreement but prior to January 1, 1977, the minimum pension payment will be $125 per month, but such amount will be increased to the pension levels at age 62 shown in the table on page .... If the disabling accident occurs on or after January 1, 1977, the initial pension levels at age 62 shown on page — will apply immediately. (For example, a miner disabled during this period of time who is age 44 and has 22 years of employment, would be eligible effective January , 1975, for a disability pension of $293.00 per month). If the disabling accident occurs in 1977, the higher schedule of benefits shown in the table on page will apply. (In this case the example Employee would receive $304.00 per month.)

(5) PENSIONS FOR WIDOWS:

The new Plan provides, for the first time, for widows' pensions. Benefits will ordinarily be payable according to the following schedule:

(a) If a miner working on or after the effective date of this Agreement becomes eligible for a pension at any time thereafter, his widow will be entitled to receive a Surviving Spouse pension equal to 50% of his pension until her death.

(b) If, on or after the effective date of this Agreement, a working miner dies (regardless of cause) and would have been eligible for an immediate pension had he retired on the date of his death, his widow will be eligible for a pension equal to 50% of the pension he would have received, and will receive this pension until her death.

(6) DEFERRED VESTED PENSION

If a working miner terminates his employment from the Belle Ayr Mine of the AMAX Coal Company for any reason after completing 10 years of employment in the coal mining industry, and before age 55, he will be eligible to receive a pension at age 62, or an actuarially reduced pension at any time after age 55. The pension will be based on the benefit rates stated in the Plan at the time the miner terminates his employment and total years of employment in the coal mining industry reduced by any benefit the miner is entitled to receive from the United Mine Workers of America Pension Trusts.

If a working miner terminates his employment from the Belle Ayr Mine of the AMAX Coal Company for any reason before completing 10 years of employment in the coal mining industry and before age 55, but subsequently continues to work in the coal mining industry and subsequently complete 10 years of employment in the coal mining industry, he will be eligible to receive a pension at age 62 or an actuarially reduced pension at any time

after age 55 upon proper application to the AMAX Coal Company. The pension will be based on the benefit rates stated in the Plan at the time the miner terminates his employment from the Belle Ayr Mine of the AMAX Coal Company and the years of employment with the Belle Ayr Mine of the AMAX Coal Company.

(7) WELFARE BENEFITS—See "ELIGIBILITY FOR BENEFITS")

(a) First Year of Contract:

Under the terms of this agreement, insurance benefits will be as follows and the company will pay the entire cost of the program.

Basic Group Life Benefits Coverage	*Benefit*
Working miner with 1 to 5 dependents	$8,500
Working miner with 5 to 10 dependents	$9,000-$11,000
Working miner with no dependents	$3,000
Pensioned miner with no dependents	$3,000
Pensioned miner with dependents	$3,500
Accidental Death and Dismemberment (24 hour coverage)	
Working miner with 1 to 5 dependents	Amount equal to life insurance plus $100 per month to widow or to surviving children to age 22. $100 benefit to widow stops at death or remarriage.
Working miner with 5 to 10 dependents	

Sickness and Accident Insurance
(90 days is presumed recovery)
Sickness—$100 per week
Service of:

0 to 6 months	no benefit
6 months to 5 years	13 weeks*
5 years to 10 years	26 weeks*
10 years or more	52 weeks*

* 1st day in hospital or 8th day of sickness. Primary Social Security carveout as appropriate as well as Workmen's Compensation (including State Black Lung), State or Federal disability benefits (excluding veterans benefits) and Federal Black Lung.

(Sickness and Accident Insurance benefits effective 6 months after date of signing.)

Accident (24 hour coverage)	1st day of
$100 per week	accident or 1st
Service	day in hospital
Date of employment:	—52 weeks
	(Carveout
	provisions same
	as "Sickness"
	shown above)

Medical Services—For miners and their dependents

These benefits are also extended to surviving spouses, retired miners and to eligible dependents of such spouses and retirees. In the case of surviving spouses the coverage is extended until remarriage or death. In the case of dependent children, until marriage or age 22. For those eligible for Medicare whether by reason of age or disability, such benefits will be carved out of this Medical program. The standard Coordination of Benefits clause will operate.

Hospital—	365 days semi-private
Special services	unlimited
Intensive care	in full
Pre-admission testing	in full
Out-patient, emergency accident and life saving services	in full
Out-patient surgery	in full
Out-patient radiation therapy including chemotherapy	in full
Maternity	in full
Pap smear tests and acupuncture when administered under the direction of a licensed physician	in full
Physicians Services—	
In or out of hospital	
Surgical	Reasonable and customary
Obstetrical	reasonable and customary
In-hospital medical services	in full
Anesthesia	reasonable and customary
Radiation therapy	reasonable and customary
Diagnostic X-ray	reasonable and customary
Emergency accident and life saving	reasonable and customary
Well baby care—3 months following birth	reasonable and customary
Pap smear test and acupuncture (when administered under the direction of a licensed physician)	reasonable and customary

Major Medical
Maximum $250,000 with $100 deductible—$300 family 80-20 coverage for the first $5000 of covered expenses, thereafter the plan pays 100% for the balance of the calendar year.
Automatic reinstatement of $1000 each January 1.
Standard "covered expenses" provided include convalescent and nursing home care.
Special Accident Coverage
$300 each occurance

(b) Second Year Of Contract:
Prescription Drugs
$1.00 deductible per prescription

(c) Third Year Of Contract:
Vision Care

1 examination per year	$15.00
1 set of lenses per year	$8-$10-$12
1 set of frames per 2 years	$7.00

The group life insurance, survivor benefits, accidental death and dismemberment insurance, accident and sickness benefits and the comprehensive medical care plan will be provided through an insurance contract with the Metropolitan Life Insurance Company.

It is proposed that in administering the weekly loss of time benefits the checks for such benefits be drawn at the coal company office on drafts provided by the Metropolitan for that purpose. This will assure prompt payment of the weekly benefit and avoid unusual mail delays.

Since all medical benefits are on an "in full" basis it is expected that payment will be made directly to the purveyor of services.

The terms and conditions of the Welfare and Retirement Program (Article XVIII of this agreement) provided by Amax Coal Company, Belle Ayr Mine, are properly described in detail in Employee Booklets which will be provided at a later date.

The terms and conditions outlined in Article XVIII (Welfare and Retirement) are intended only to summarize the provisions of the Welfare and Retirement Plan.

For the Company _____

For the Union _____

Date _____

RETIRE IN 1975 and 1976

Years of Service	Age 55	56	57	58	59	60	61	62 or older
10	102.70	106.60	110.50	114.40	118.30	122.20	126.10	130.00
11	113.40	117.70	122.00	126.30	130.60	134.90	139.20	143.50
12	124.03	128.74	133.45	138.16	142.87	147.58	152.29	157.00
13	134.73	139.84	144.95	150.06	155.17	160.28	165.39	170.50
14	145.36	150.88	156.40	161.92	167.44	172.96	178.48	184.00
15	156.06	161.98	167.90	173.82	179.74	185.65	191.58	197.50
16	166.69	173.02	179.35	185.68	192.01	198.34	204.67	211.00
17	177.39	184.12	190.85	197.58	204.31	211.04	217.77	224.50
18	188.02	195.16	202.30	209.44	216.58	223.72	230.86	238.00
19	198.72	206.26	213.80	221.34	228.88	236.42	243.96	251.50
20	209.35	217.30	225.25	233.20	241.15	249.10	257.05	265.00
21	220.41	228.78	237.15	245.52	253.89	262.26	270.63	279.00
22	231.47	240.26	249.05	257.84	266.63	275.42	284.21	293.00
23	242.53	251.74	260.95	270.16	279.37	288.58	297.79	307.00
24	253.59	263.22	272.85	282.48	292.11	301.74	311.37	321.00
25	264.65	274.70	284.75	294.80	304.85	314.90	324.95	335.00

26	275.71	286.18	296.65	307.12	317.59	328.06	338.53	349.00
27	286.77	297.66	308.55	319.44	330.33	341.22	352.11	363.00
28	297.83	309.14	320.45	331.76	343.07	354.38	365.69	377.00
29	308.89	320.62	332.35	344.08	355.81	367.54	379.27	391.00
30	319.95	332.10	344.25	356.40	368.55	380.70	392.85	405.00
31	331.44	344.02	356.60	369.18	381.76	394.34	406.92	419.50
32	342.86	355.88	368.90	381.92	394.94	407.96	420.98	434.00
33	354.35	367.80	381.25	394.70	408.15	421.60	435.05	448.50
34	365.77	379.66	393.55	407.44	421.33	435.22	449.11	463.00
35	377.26	391.58	405.90	420.22	434.54	448.86	463.18	477.50
36	388.68	403.44	418.20	432.96	447.72	462.48	477.24	492.00
37	400.17	415.36	430.55	445.74	460.93	476.12	491.31	506.50
38	411.59	427.22	442.85	458.48	474.11	489.74	505.37	521.00
39	423.08	439.14	455.20	471.26	487.32	503.38	519.44	535.50
40	434.50	451.00	467.50	484.00	500.50	517.00	533.50	550.00

Years of Service	RETIRE IN 1977 Age 55	56	57	58	59	60	61	62 or older
10	106.65	110.70	114.75	118.80	122.85	126.90	130.95	135.00
11	117.71	122.18	126.65	131.12	135.59	140.06	144.53	149.00
12	128.77	133.66	138.55	143.44	148.33	153.22	158.11	163.00
13	139.83	145.14	150.45	155.76	161.07	166.38	171.69	177.00
14	150.89	156.62	162.35	168.08	173.81	179.54	185.27	191.00
15	161.95	168.10	174.25	180.40	186.55	192.70	198.85	205.00
16	173.01	179.58	186.15	192.72	199.29	205.86	212.43	219.00
17	184.07	191.06	198.05	205.04	212.03	219.02	226.01	233.00
18	195.13	202.54	209.95	217.36	224.77	232.18	239.59	247.00
19	206.19	214.02	221.85	229.68	237.51	245.34	253.17	261.00
20	217.25	225.50	233.75	242.00	250.25	258.50	266.75	275.00
21	228.74	237.42	246.10	254.78	263.46	272.14	280.82	289.50
22	240.16	249.28	258.40	267.52	276.64	285.76	294.88	304.00
23	251.65	261.20	270.75	280.30	289.85	299.40	308.95	318.50
24	263.07	273.06	283.05	293.04	303.03	313.02	323.01	333.00
25	274.56	284.98	295.40	305.82	316.24	326.66	377.08	347.50

26	285.98	296.84	307.70	318.56	329.42	340.28	351.14	362.00
27	297.47	308.76	320.05	331.34	342.63	353.92	365.21	376.50
28	308.89	320.62	332.35	344.08	355.81	367.54	379.27	391.00
29	320.38	332.54	344.70	356.86	369.02	384.18	393.34	405.50
30	331.80	344.40	357.00	369.60	382.20	394.80	407.40	420.00
31	343.65	356.70	369.75	382.80	395.85	408.90	421.95	435.00
32	355.50	369.00	382.50	396.00	409.50	423.00	436.50	450.00
33	367.35	381.30	395.25	409.20	423.15	437.10	451.05	465.00
34	379.20	393.60	408.00	422.40	436.80	451.20	465.60	480.00
35	391.05	405.90	420.75	435.60	450.45	465.30	480.15	495.00
36	402.90	418.20	433.50	448.80	464.10	479.40	494.70	510.00
37	414.75	430.50	446.25	462.00	477.75	493.50	509.25	525.00
38	426.60	442.80	459.00	475.20	491.40	507.60	523.80	540.00
39	438.45	455.10	471.75	488.40	505.05	521.70	538.35	555.00
40	450.30	467.40	484.50	501.60	518.70	535.80	552.90	570.00

SUPREME COURT OF THE UNITED STATES

No. 80-289

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, ET AL., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER ALLOWING CERTIORARI

Filed January 19, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, limited to Question 1 presented by the petition. The case is consolidated with No. 80-692, National Labor Relations Board v. Amax Coal Company, A Division of Amax, Inc., et al., and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 80-692

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

ORDER ALLOWING CERTIORARI

Filed January 19, 1981

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Nos. 80-289 & 80-692

Supreme Court, U. S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854
AND UNITED MINE WORKERS OF AMERICA,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
and
AMAX COAL COMPANY
A DIVISION OF AMAX, INC.,
Respondents
and
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a union violate Section 8(b) (1) (B) and 8(b) (3) by insisting to impasse and striking to force the employer's participation in a multiemployer trust fund?

2. Is a proposed contract clause that would require the Employer to agree to extend the entire collective bargaining agreement to any of its mines, coal lands, and facilities operated or put into operation by the Employer, subsidiary or affiliate at any time during the duration of the contract, a non-mandatory subject for bargaining and the union's insistence and strike therefor a violation of Section 8(b) (3) of the Act?

3. Is the insistence upon and strike for proposed clauses that would require lessees or licensees to recognize the union violative of Section 8(b) (3) and (e) of the Act?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854
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v.
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AMAX COAL COMPANY
A DIVISION OF AMAX, INC.,
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and
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

This case involves the National Labor Relations Act, as amended, 29 U.S.C. § 158 (hereinafter referred to as Section 8 of the Act); the Labor Management Relations Act of 1947, 29 U.S.C. § 186 (hereinafter referred to as Section 302 of the Act or LMRA); and the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501 (hereinafter referred to as Section 501 of the LMRDA). This case also

involves the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002-1108 (hereinafter referred to as ERISA §§ 3, 404, 406 and 408).

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit correctly held that United Mine Workers of America, Local No. 1854, and United Mine Workers of America (hereinafter the Petitioners or Union) had refused to bargain in violation of Section 8(b)(3) of the Act.

The issues raised in the Union's Petition for a Writ of Certiorari represent only three of a number of unfair labor practice violations, including refusals to bargain, found by the Administrative Law Judge (ALJ), the National Labor Relations Board (Board) and/or the Court of Appeals.

Petitioners had engaged in and were found to have committed many acts of refusal-to-bargain conduct in violation of Section 8(b)(3) of the Act. These violations included findings that Petitioners had refused to meet and bargain with Amax Coal Company, a division of Amax, Inc. (hereinafter Amax), insisted that Amax select as its bargaining representative a multiemployer association, insisted that Amax accept non-Amax representatives for negotiations, insisted upon various contract clauses that were nonmandatory subjects of bargaining, and engaged in other conduct (e.g., strikes) in order to force Amax to accede to Petitioners' unlawful demands. The attempts to preclude Amax from negotiating separately and to force Amax to join an association were furthered by various demands including the insistence upon Amax's acceptance of predesignated trustees of a Section 302(c)(5) trust. Amax had proposed retirement and health and welfare programs, which offered the employees better benefits than under the Union Trusts. Petitioners refused to consider these proposals and, instead, insisted that Amax participate in the

multi-employer trust fund. The issues raised in the Petition should be reviewed within this totality of conduct by Petitioners and must be analyzed in that refusal-to-bargain context.

Petitioners' insistence upon and strike to force Amax's participation in a multiemployer trust fund and to select as its representative an already-designated management trustee to the multiemployer trust fund was a violation of Section 8(b)(1)(B) of the Act. Section 302(c)(5) authorizes trust funds for certain benefits, provided that the employees and employers are equally represented in the administration of the funds. When the Petitioners refused to consider Amax's pension and health insurance proposals and insisted to impasse, among other demands, that Amax participate in a multiemployer trust fund, which was tantamount to refusing Amax the right to appoint a trustee, they were restraining and coercing Amax in the selection of its representative for collective bargaining purposes.

Employer representatives and Union representatives on joint trust funds do not lose their representational status by virtue of their appointment as trustees. The duties and functions performed as trustees are, in large measure, that of agents for their respective appointing party. This agency relationship has been long recognized by the National Labor Relations Board.

Further the fiduciary obligations of a trustee do not remove the trustees as representatives or agents of the appointing parties. While trustees owe a fiduciary duty to the trust beneficiaries, this is only one aspect of their status. The management and union trustees, both pursuing the interest of the beneficiaries as a group, have definite and frequently different views on contributions, distributions, and other trust administration matters. On these decisions, the fiduciary obligations are not compromised; rather, they are a plateau upon which bargaining-type decisions are made by the trust representatives. This premise was recognized by Congress when it set forth in Section 302(c)(5)

that if the trustees are unable to resolve a dispute, it is to be submitted to a third party decision-maker (i.e., arbitrator).

ERISA did not change the previously existing duty that all trustees had to act in a prudent manner with respect to the beneficiaries; nor was it intended to remove the trustee from his representative or agency relationship. To the contrary, ERISA § 408(c) (3) recognizes that a trustee may also be an officer, employee or representative of a party in interest. In this context, the Congressional intent of both the LMRA and ERISA has been effectuated.

The Coal Lands and Enabling Clauses insisted upon by Petitioners are not mandatory subjects of bargaining. These clauses apply to non-bargaining unit employees. The clauses fail to meet the "vital concern" test established by the Supreme Court. Matters outside the bargaining unit are to be considered mandatory *only* where they would vitally affect job security and where the extra-unit language constitutes a direct attack on the specific problem. The Enabling and Coal Lands Clauses are general, overly broad, and have a direct and adverse effect upon the enterpreneurial decision-making of the Employer. The clauses, therefore, do not fulfill the requirements for the determination of a mandatory subject of bargaining. Thus, the Union's insistence to impasse and strike were unlawful acts violative of Section 8(b) (3) of the Act.

The Leasing-Licensing Out Clause also is a non-mandatory subject of bargaining. This clause does not protect unit-employee work or standards. Rather, the clause is an attempt to promote Petitioners' interests generally. The clause has a secondary objective, which is to require lessees/licensees to recognize the Union and assume all of Amax's contractual obligations.

ARGUMENT

I.

PETITIONERS' INSISTENCE TO IMPASSE THAT AMAX PARTICIPATE IN A MULTIEMPLOYER TRUST FUND VIOLATES SECTIONS 8(b) (3) AND 8(b) (1) (B) OF THE ACT.

A. The decision of the Court of Appeals for the Third Circuit is not in conflict with existing law.

In their Petitions, the United Mine Workers of America, Local No. 1854 and United Mine Workers of America (hereinafter the Petitioners or Union) and the Solicitor General (hereinafter the Board), argue that the Union did not violate Sections 8(b) (1) (B) and 8(b) (3) of the Act by insisting to impasse and striking to obtain Amax's participation in the UMWA Health and Retirement Funds (hereinafter the Funds), for the reason that trustees of multiemployer pension and welfare trusts created under Section 302(c) (5) of the Act (so-called "Taft-Hartley" fund trustees) are not collective bargaining representatives within the meaning of Section 8(b) (1) (B). This argument is also advanced by Amicus Curiae, Board of Trustees of the UMWA Health and Retirement Funds, in its brief in support of Petitioners.

None of the cases cited as authority by the Petitioners, the Board and Amicus Curiae bear the slightest similarity to the context in which the instant case arose. Petitioners, Board and Amicus Curiae have extracted the most precarious dicta with no regard to context in order to support their argument that the instant case is in conflict with prior case law.

Lamb v. Carey, 498 F.2d 789 (D.C. Cir.), *cert. denied*, 419 U.S. 869 (1974), is relied on by Petitioners, Board and Amicus Curiae for the proposition that Section 302(c) (5) representatives owe their duty "to the [trust] beneficiaries and not to [the appointing party]." (Union's Petition, p.14). In *Lamb*, Carey was designated as a trustee of a UMWA Taft-Hartley fund by Union President Boyle. Subsequently,

Boyle lost the Union presidency to Miller in a hotly contested election and Miller sought to remove Carey as trustee because of Carey's close alliance with the defeated Boyle faction.

The Court of Appeals for the District of Columbia affirmed the District Court's order removing Carey as a trustee of the fund for the sole reason that Carey did not have a good working relationship with the party that had appointed him. The Court stated that a requirement of "crucial importance" was the unchallenged finding of the District Court that "[c]lose collaboration with the Union [on the part of the Union trustee] is required in an atmosphere of mutual confidence to further the objectives and effectiveness of the Fund." *Id.* at 793. The Court found that a Taft-Hartley Fund "is a hybrid trust which does not neatly fit into the categories of ordinary trusts" and, in interpreting the statutory scheme whereby employees and employers are equally represented in the administration of such funds, together with such neutral persons as the representatives select, stated that:

> [i]t is evident that Congress was aware of the unusual need in the field of labor relations for the special interests of the employers and the employees to be *represented* in the administration of the trust. Also, recognizing that such representation might frequently lead to irreconcilable conflict, a neutral party had to be added to the board.

Id. (Emphasis in original).

Clearly, Petitioners' citing of *Lamb* for the proposition that the Section 302(c) (5) representative's duty is to the beneficiaries and not to the appointing party is a distortion of the Court's reasoning, as well as taken out of context.

Petitioners also attach great weight to an alleged contradiction between the Third Circuit's decision in *Associated Contractors of Essex County, Inc. v. Laborers International Union*, 559 F.2d 222 (3d Cir. 1977), and that Court's decisions in *United Marine Division, Local 333 v. Essex*

Transportation Co., 216 F.2d 410 (3d Cir. 1954), and *Mechanical Contractors Association of Philadelphia, Inc. v. Local Union 420*, 265 F.2d 607 (3d Cir. 1959). The Petitioners argue that a contradiction exists merely by extracting an out-of-context quotation from *United Marine Division* and comparing it to a quotation from *Associated Contractors*. (Union's Petition, pp. 17-18). This method of "analysis" cannot withstand examination.

In *United Marine Division*, the Court of Appeals expressly stated that the sole question before it was whether Section 302(a) (1) was violated by an employer who agreed to make payments to a Taft-Hartley fund. Section 302(a) (1) makes it unlawful for "any employer to . . . agree to pay . . . any money . . . to any representative of any of his employees." The Court of Appeals held that the trustees of the fund were not "representatives" within the meaning of Section 302(a) (1) but fulfilled the "equal representation" requirement of Section 302(c) (5) (B). The Court based its holding on the ground that the Congressional intent of Section 302(c) (5) was to encourage legitimate trust funds while forbidding money to be paid to union representatives unless through a trust fund. 216 F.2d at 412. Obviously, there is no conflict between this interpretation of "representative", when taken in context, and the interpretation of "representative" given by the Third Circuit in the instant case in the course of finding violations of Sections 8(b) (1) (B) and 8(b) (3).

The fallacy of Petitioners' reasoning is that none of the cases cited apply to a situation where the union is refusing to bargain and trying to force (1) the employer to participate in a multiemployer trust fund even though the employer proposed the same (and better) benefits through an employer plan, (2) the employer to give up its right to select a representative to administer such funds and (3) to accept the preselected trust representatives. Moreover, none of the cases or authorities cited by Petitioners or the

Board even remotely reflect the premises upon which the instant case arises: The totality of conduct clearly established that Petitioners failed and refused to bargain in good faith with Amax.

Briefly summarized, the record below established that Petitioners insisted upon and struck to force Amax to select a multiemployer association as its bargaining representative. Amax refused and sought to negotiate its own collective bargaining agreement, which included better retirement and health and welfare benefits than under the multiemployer trust fund plan. To put further pressure on Amax and to leverage Amax into the association, Petitioners, among other actions and conduct, refused to consider Amax's benefit plans proposals and, instead, insisted that Amax participate in the funds established by Petitioners and the Bituminous Coal Operators Association (BCOA). Such insistence was accompanied by a strike called by the union.[1] It should be noted that the various findings of the refusal-to-bargain violations, such as the strike to compel Amax to join and bargain through a multiemployer association, the coercion of Amax in the selection of representatives for negotiating purposes, the refusal to meet and negotiate with Amax, etc., were not appealed nor contested by Petitioners. It is important, however, that this totality of conduct be considered as it establishes the context in which the issues of these Petitions arise.[2]

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[1] As noted in the Board's Petition on page 4, Amax put into effect its last offer, including its Pension Plan and Health and Welfare Programs.

[2] In its decision, the Board noted that at the time of its decision, there was a petition for an election pending before the Board. See Union's Petition Appendix B, pp. 191a-192a. Subsequently, the election was conducted by the Board and the employees voted to reject the Petitioners herein, as well as a number of other representatives on the ballot.

Viewing all of the circumstances, the Court of Appeals correctly perceived the issue when it concluded that the Union violated the Act by striking to force Amax's participation in a fund whose management trustee is not selected by Amax. See Union's Petition Appendix C, p. 226a.

The Court of Appeals' correct view of the law is shared by at least one other Court of Appeals. In *Denver Metropolitan Association of Plumbing Contractors v. Journeyman Plumbers Local No. 3*, 586 F.2d 1367 (10th Cir. 1978), the Court of Appeals for the Tenth Circuit analyzed the purpose of Section 302(c) (5) and equal-trustee representation, to wit, protection of participants and beneficiaries from exploitation by unscrupulous union officials.

> So long as the employer trustees are truly independent of the domination of the unions, we perceive no reason why each contributing employer must be a direct participant in the trustee selection *if he is willing* to contract away that right.

586 F.2d at 1375 (emphasis added).

The emphasized statement is the key premise in the instant case. Amax was not willing to contract away its right to participate in the trustee selection process.

In contrast, both the Petitioners and the Board mischaracterize this issue by limiting their analysis to the status of a Section 302(c) (5) trustee *during* the administration of an operational plan *after* the parties have executed a contract embodying their agreement to provide such benefits.[3] They fail to include the refusal to bargain aspect of the issue. Instead, Petitioners' frame the issue with axiomatic assertions about the mandatory nature of pension and welfare benefits.

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[3] The Board in its Petition cites the *Denver Metropolitan* case for authority that ERISA requires strict fiduciary standards of trustees. The Board, however, fails to make note of the above-quoted limitation, which is the key aspect of the case that is directly applicable to the instant issue.

This was *not* the issue addressed by the Court of Appeals. Clearly, the decision focuses on the Union's attempted imposition of a multiemployer trust fund with preselected employer trustees during the bargaining prior to reaching an agreement.

It is, therefore, submitted that the basic premise that this Court must consider is whether or not Petitioners can insist upon the requirements (1) that Amax forego negotiations of its own benefit plans proposals and (2) that Amax must agree to participate in the multiemployer (BCOA-Union) trust fund plans. Amax's efforts to preserve its right to negotiate its own benefit plans with the concomitant right to appoint a trustee arose in this context.

In determining that Petitioners could not force Amax's participation in the multiemployer trust funds, the Court of Appeals analyzed the question of whether or not the trustees were representatives within the meaning of Section 8(b) (1) (B) of the Act. The Court of Appeals concluded that union and employer trustee-appointees serve as representatives of the parties who appoint them.

B. LMRA AND ERISA are not inconsistent.

The Court of Appeals correctly held that the provisions of the LMRA and ERISA should be interpreted to effectuate the Congressional intent of both federal statutes so that the trustee representatives of a multiemployer plan serve not only as fiduciaries of the plan within the meaning of ERISA, but also as collective bargaining representatives within the meaning of the Act insofar as their duties as collective bargaining representatives are consistent with their fiduciary duties.

It is axiomatic that provisions in different federal statutes should, if possible, be interpreted to effectuate the Congressional intent of both statutes. *Cutaiar v. Marshall,* 590 F.2d 523, 530 (3d Cir. 1979).

Specifically, the representation duties imposed by Section 302(c) (5) upon the trustees of a multiemployer plan should be construed to coexist with the fiduciary duties imposed by Section 302 and elucidated by ERISA Sections 404(a) (1) (A) (i) and 406(b) (2), so that the trustees serve as both collective bargaining representatives within the context of Section 8(b) (1) (B) and fiduciaries as defined in ERISA Section 3(21) (A). If the duties imposed by Section 302(c) (5) on collective bargaining representatives are construed to conflict with the duties imposed on fiduciaries by ERISA Sections 404(a) (1) (A) (i) and 406(b) (2), contrary to the Congressional intent underlying the equal representation premise of Section 302 (c) (5), the trustees cannot serve in both capacities. Thus, the Congressional intent of both statutes would not be effectuated and a basic legal axiom violated.

1. Representation Role

The role of trustee representatives in multiemployer plans in their capacity as collective bargaining representatives has been widely recognized. There has been candid acknowledgment by the courts that the relationship between employer and employee trustees of a multiemployer plan is quasi-adversarial in nature and that the trustees function not only as fiduciaries for the beneficiaries of the plan, but also serve as representatives of the parties who appoint them.

The Court of Appeals for the Third Circuit has recognized that the requirement that employers and employees be represented in the joint administration of trust funds is central to the Congressional scheme set forth in Section 302. In *Associated Contractors of Essex County, Inc. v. Laborers International Union*, 559 F.2d 222 (1977), the Court stated:

> The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature. Naturally, the

> trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. See *Lamb v. Carey*, 162 U.S.App.D.C. 247, 498 F.2d 789, 793 (1974); *Toensing v. Brown*, 374 F.Supp. 191 (N.D.Cal. 1974), aff'd, 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 Cornell L. Rev. 901, 921 et seq. (1970). The trustees' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section 302(c) (5). Congress envisioned the conflict of view of employer and employee as a distilling process which would provide safeguards against trust fund corruption.

559 F.2d at 227-28.

In the instant case, it is important to note that Article 11(f), Sickness and Accident Benefits, of the Union's January 6, 1975, proposal (attached as Appendix A), established the broad authority of the trust representatives. That authority included the discretion to select and set criteria for "acceptable" insurance carriers; to investigate disputed claims; to establish consistency in the plan coverage and in the awarding of claims; to cull out "unacceptable" insurance carriers; to enforce compliance with what the trust representatives conceive to be the terms and objectives of the plan; and to determine whether provisions of the collective bargaining agreement have been breached and the enforcement thereof.

Such authority to choose, select and eliminate insurance carriers and non-conforming plans is clearly an extension of the collective bargaining process, and the trustees' power to investigate, reject and allow claims can only be equated with the ability to adjust grievances. Moreover, the trustees must determine where the plans, trust agreements or the

bargaining contract itself, have been breached or violated and then pursue all legal remedies (see Article 20, Section (e) of the 1/75 proposal, attached as Appendix A). The trustees further determine the eligibility or ineligibility of pension beneficiaries whose right to receive benefits has been challenged (Article 20, Section (h) (3), attached as Appendix A). Here again, the trustees resolve grievances.

In what is a pure extension of the collective bargaining process, the trustees are authorized, upon approval by the employers and the union, to make such changes in the plans and trusts as they may deem to be necessary or appropriate (Article 20, Section (h) (5), attached as Appendix A). As is the case with any bargaining representative, the trustees confer with their principals and make the desired changes. Article 11 of the pension trust (attached as Appendix A) confirms this wide-ranging delegation to the trustees.

It is obvious, then, that the trustees have broad, discretionary authority. The employer-trustee representative status assigned under Section 302 is for the specific purpose of making sure the trust fund representatives properly make decisions which are "of major importance to the employer, the coal industry, as well as the beneficiaries represented through their Union." *Blankenship v. Mine Workers Fund*, 82 L.R.R.M. 3073, 3074 (D.D.C. 1973).

2. Fiduciary obligations

The trustees interpret, apply, administer and "enforce" the provisions of the fund and the provisions of the collective bargaining agreement in no less important, but probably more significant, a role in the administration of the agreement than Union "stewards" or company "supervisors"; they are even empowered to set and determine contributions to the Trusts.

Concededly, Section 302(c) (5) trust representatives owe a fiduciary duty to the trust beneficiaries. However, that is only one aspect of their status. Both at the bargaining table and at the trust fund conference table, each side has a defi-

nite and frequently different view on how it wants the money distributed. These decisions do not threaten the fiduciary standards. They are a plateau upon which bargaining-type decisions are made by the trust representatives.

Section 501 of LMRDA, entitled "Fiduciary Responsibility of Officers of Labor Organizations", defines in broad terms the obligations of union officials. In particular, Section 501(a) sets forth that "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." It is, therefore, the duty of these officers and representatives "to hold [the union's] money and property *solely* for the benefit of the organization and its members." (Emphasis added).

Thus, a fiduciary relationship is created by Section 501, requiring union agents to act in the interests of the union and its membership. Yet those agents are clearly recognized and awarded status as "representatives" within the meaning of Section 8(b) (1) (B), because they engage in collective bargaining and the adjustment of grievances.

Contrary to the arguments constructed by the Petitioners and the Board, Section 501 demonstrates Congressional support for the proposition that a fiduciary obligation does *not* preclude, and may complement, representative status.

The Congressional intent, evidenced by the statutory scheme of Section 302(c) (5), was to recognize the quasi-adversarial nature of the relationship between employer and employee trustees and to impose a representation duty upon the trustees of multiemployer plans in their role as collective bargaining representatives of the parties who appoint them.

The fiduciary responsibility provisions of ERISA §§ 404 and 406 are designed to restate the common law fiduciary standards of conduct for trustees, administrators and others dealing with retirement plans. Conference Report No. 93-1280, 93d Cong., 1st Sess. 306 *et seq.* (1974) *reprinted in*

Internal Revenue Cumulative Bulletin, 1974-3. Thus, the trustee representatives of a multiemployer plan are not only subject to the representation duties imposed upon them by the LMRA, but are also subject to strict fiduciary duties imposed upon them by ERISA.

Any conflict between the LMRA and ERISA is more apparent than real. *Cutaiar v. Marshall,* 590 F.2d at 530. Whereas Section 302(c) establishes certain structural and procedural requirements for multiemployer plans, ERISA codifies the fiduciary standards for the administration of such plans. Thus, the trustees' representation duties under LMRA Section 302 must conform to the fiduciary standards set by ERISA. As was noted by the Court of Appeals in its decision in the instant case:

> Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process.

614 F.2d at 882.

The situations which present a trustee of a multiemployer plan with problems of reconciling obligations under ERISA with obligations to an employer, union, and others are numerous. Congress chose to solve the problem of divided loyalties by prohibiting a fiduciary from acting in any *transaction* involving a pension plan on behalf of a party whose interests are adverse to the interests of the plan, or its participants or beneficiaries. ERISA § 406(b) (2). However, it must be noted that Section 408(c) (3) of ERISA also provides that nothing in Section 406 shall be construed to prohibit a fiduciary from serving as such in addition to being an officer, employee or *representative* of a party in interest. Thus, even ERISA itself recognizes, and permits, collateral interests.

The case of *Curren v. Freitag*, 432 F.Supp. 668 (S.D. Ill. 1977), is illustrative of the recognition of the representative duties and fiduciary obligations. The issue in that case was whether the activities of a management trustee, who was also employed as the Director of Labor Relations of an employer group signatory to the Section 302(c) (5) Pension Funds, violated his trustee fiduciary obligations. While noting the possible conflict between the fiduciary responsibilities of ERISA and the provisions of Section 302 of the LMRA, the Court stated that Section 408(c) (3) of ERISA provides specifically that a person may serve as a fiduciary with respect to a plan and as a representative of a party in interest. As such, as held by the Court, a trustee is not precluded from fulfilling his representative duties simply because he had become a trustee. The Court posited that the laws must be read together in order to give effect to both. *See also NLRB v. Construction and General Laborers' Union Local 1140*, 577 F.2d 16 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

Accordingly, both the LMRA and ERISA should be interpreted so as to effectuate the Congressional intent of both statutes—representation duties *and* fiduciary obligation. The statutes are not mutually exclusive. Rather, the representation duties of trustees of multiemployer plans coexist with the trustees fiduciary obligations insofar as they are consistent.

3. Expansion of NLRB Jurisdiction

For the first time, Petitioners argue that the Court of Appeals decision on the trustee issue expands upon the Board's unfair labor practice jurisdiction to include an area of law that Congress has specifically granted to the Secretary of Labor and federal courts. The creativity of this argument is surpassed only by its lack of support in the logic, law or the realities of industrial life.

For many years, the Board has held that certain Section 302(c) (5) trustees and trust funds have violated Section 8 of the Act by acting as agents of the parties appointing them. *See, e.g., Jacobs Transfer, Inc.*, 227 N.L.R.B. 1231 (1977) (trusts, in refusing to accept contributions, are agents of union and employer); *L & M Carpet Contractors, Inc.*, 218 N.L.R.B. 802 (1975) (trustees are agents of each party to collective bargaining agreement); *Fixtures Unlimited*, 213 N.L.R.B. 363 (1974) (union trustees are "agents" of respondent); *Turner-Brooks, Inc.*, 161 N.L.R.B. 229 (1966) (union refused to bargain through its agent, Section 302 trustee).

In finding that the trusts and/or trustees have violated the Act through conduct occurring during the internal administration of the trust, the Board has *already* assumed very broad jurisdiction over employee benefit trust administration. Such jurisdiction is totally unaffected by the Court of Appeals' holding in the instant case, which is limited in applicability to bargaining demands made prior to reaching a participation agreement.

4. Subject for Bargaining

The Court of Appeals granted Amax's petition for review and denied enforcement of the Board order pertaining to the trustee issue. One of the bases for this holding is that the Board relied entirely on its decision in *Central Florida Sheet Metal Contractors Association*, 234 N.L.R.B. 1238 (1978), *petition for review pending*, No. 79-2396 (5th Cir.), where it held that a union's insistence in negotiations upon a multiemployer trust fund, for which the employer's, as well as the union's, representatives are already chosen, is not unlawful inasmuch as the limitation on choice of trustees contains more of a "nexus" with employee benefits, which are a mandatory subject of bargaining, than with an employer's right to choose its representatives under Section 8(b) (1) (B) of the Act.

This is a specious distinction. Both parties' "nexus" with benefits is through their representatives, as there cannot be any benefits without a collective bargaining agreement and a representative to "deal" for them.

It is the Board's position that the selection of those charged with the administration of the funds under the trustee designation clause is a mandatory subject of bargaining. At the same time, it has repeatedly held that the selection of representatives dealing with other benefits like wages or hours is a permissive subject. The Board's distinction defies logic and makes a mockery of a principal tenet of our collective bargaining system that each party shall be free to select its own representative without pressure from the other side. Fortunately, the Court of Appeals did not lose sight of this when it held that:

> the Union's conduct in insisting to impasse and striking to obtain Amax's participation in the Union's pension and trust fund violates Section 8(b) (1) (B) and 8(b) (3).

614 F.2d at 882.

Accordingly, those portions of the Petitions attacking this holding should be denied.

II.

THE ENABLING CLAUSE AND COAL LANDS CLAUSE INSISTED UPON BY PETITIONERS VIOLATE SECTION 8 (b) (3) OF THE ACT.

The Court of Appeals found, as did the Administrative Law Judge, that the Enabling Clause and Coal Lands Clause were not mandatory subjects for bargaining and that the Union's insistence upon the scope of the Enabling

Clause and Coal Lands Clause[4] (which goes beyond the bargaining unit) violates Section 8 (b)(3) of the Act.

Both clauses contain language that would require Amax to extend the collective bargaining agreement to "all other western sub-bituminous and lignite mines, coal lands, coal producing and coal preparation facilities, . . ." which may be put into use. The agreement not only applies to the operations of Amax, but would also apply to any operations by any "subsidiary" or "affiliate" of Amax. Further, the agreement would apply to any operations, not just mining. Such language encompasses operations involving employees in bargaining units and prospective bargaining units other than the bargaining unit represented by the Union at Amax's Belle Ayr Mine.

Through a series of decisions, this Court has established the tests to be applied for the determination of mandatory versus non-mandatory subjects for bargaining. In *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), this Court initiated the premise that employers and labor organizations are required to bargain on mandatory

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[4] The Enabling Clause provided in part:

> This agreement covers [Amax's] Belle Ayr Mine and all other western sub-bituminous and lignite mines, coal lands, coal producing and coal preparation facilities, owned or operated or held under lease by it, or by any subsidiary or affiliate at the date of this Agreement, or which may hereafter (during the term of this Agreement) be put into production or use on the leases attached hereto as Addendum A.

The Coal Lands Clause provided in part:

> [T]his agreement covers the operation of all coal lands, coal producing and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term which may hereafter (during the term of this agreement) be put into production or use.

PLEASE NOTE: The printed text of the Coal Lands Clause in the Court of Appeals decision contained a typographical error. The word in the first line is "operation" and not "operator".

subjects that are within the areas of "wages, hours and other terms and conditions of employment." Either party has the right to insist to impasse on such bargaining positions.

Subsequent decisions of this Court clarified the determinants of what constitutes a mandatory subject. In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), this Court promulgated the test which considers the particular subject matter upon which a party refused to bargain: Is the subject of such vital concern to both labor and management that it is likely to lead to industrial strife? In Justice Stewart's concurring opinion in *Fibreboard*, he observed that the words of the statute, "wages, hours and other terms and conditions of employment", are words of limitation. As Justice Stewart pointed out:

> In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to ... conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessary to terminate employment. If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate en-

> terprise or which impinge only indirectly upon employment security should be excluded from that area.

379 U.S. at 223.

In *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), this Court emphasized the application of the "vital concern" test and also gave recognition to the entrepreneurial control factor set forth by Justice Stewart in *Fibreboard*.

> The Board urges that Oliver and Fibreboard provide the principle governing this cause. The Company, on the other hand, would distinguish those decisions on the ground that the unions there sought to protect employees from outside threats, not to represent the interests of third parties. We agree with the Board that the principle of Oliver and Fibreboard is relevant here; in each case the question is not whether the third-party concern is antagonistic or compatible with the interests of bargaining-unit employees, but whether it vitally affects the "terms and conditions" of their employment. But we disagree with the Board's assessment of the significance of a change in retirees' benefits to the "terms and conditions of employment" of active employees.*
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> *This is not to say that application of Oliver and Fibreboard turns only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct business, may be equally important. See Fibreboard Corp. v. NLRB, supra, at 217, 13 L.Ed.2d at 242. (Stewart, J. concurring). But we have no occasion in this case to consider what, if any, those considerations may be.

404 U.S. at 179.

Although Petitioners concede that "wages, hours and other terms and conditions of employment" are words of limitation against which the subjects of bargaining are measured (Union's Petition, p. 22), they claim that the very broad and general Enabling and Coal Lands Clauses vitally

affect the terms and conditions of employment of the Belle Ayr miners. Petitioners cite *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959), as demonstrating the same type of third-party vital concern held to be within the mandatory subject area. In *Oliver*, however, the clause reviewed by this Court was a precise and narrowly-drawn provision that set forth a minimal rental to be paid owner-operators wherein the specific object was "to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." 358 U.S. at 293-94.

The Enabling and Coal Lands Clauses are *not* precise and narrowly-drawn provisions. They extend far beyond the bargaining unit of miners at the Belle Ayr mine. The clauses cover any and all types of employer-operations, mining and otherwise, and would require that the entire collective bargaining agreement, including mining conditions and other non-economic conditions, be fully applied. In this context, the Court of Appeals' analysis of the clauses is valid, consistent with other Court of Appeals' decisions, and in harmony with this Court's vital concern test.

The Court of Appeals for the Tenth Circuit, in *Lone Star Steel v. NLRB*, _____ F.2d _____, 104 L.R.R.M. 3144 (1980), held that an Enabling and Coal Lands Clause (almost identical to that in the instant case) was a non-mandatory subject of bargaining and that the United Mine Workers Union's insistence upon it constituted a refusal to bargain in violation of the Act. In finding that the Coal Lands Clause (referred to as the "application of contracts" clause) was not a proper bargaining subject, the Court analyzed the various cases and tests in determining what constitutes a mandatory subject for bargaining. The Court of Appeals then went on to set forth:

> The General Counsel and the Union contend here that the application of contract clause protects the jobs and working conditions of unit employees from a danger similar to that in *Oliver*. They argue that the clause removes the Company's economic incentive to

transfer work to another mine where the terms and conditions of employment might be inferior. We cannot agree.

The provision for the minimum rental in *Oliver* was carefully drafted to remedy a specific problem over which the parties had disagreed for seventeen years. 358 U.S. at 291-292. By contrast, the instant clause is not so directed. It is hard to read this language as a "direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective-bargaining contract." *Id.* at 294. This application of contract clause reaches all new operations and is much broader than necessary to accomplish the legitimate Union goal of protecting employees against a shift of production to another mine to evade standards and wages at the Starlight mine. The clause even requires that the agreement be put into effect in toto elsewhere, including the non-economic provisions having no bearing on the unit employees. *Amax Coal Co. v. N.L.R.B.*, 614 F.2d 872, 884 (3rd Cir.).

We are mindful that we must accord considerable deference to the Board's judgment as to what is a mandatory subject. *Ford Motor Co. v. N.L.R.B., supra,* 441 U.S. at 495. However we are convinced that here the Board did not properly observe the two-prong requirement of *Oliver* that in order for a subject involving employees outside the unit to be considered mandatory it must vitally affect the terms and conditions of employment or the job security of unit employees and must represent a direct frontal attack on the problem threatening such interests. *See Oliver, supra,* 358 U.S. at 294; *Pittsburgh Plate Glass, supra,* 404 U.S. at 178-79 and n. 18, 182. Here the implementation of the clause could only affect unit jobs if the company opened another mine. The Board ignored the ALJ's finding that application of the contract to other phases of coal production would have no bearing on unit jobs. And as noted the automatic application of the entire collective bargaining agreement, including its non-economic provisions, to other appropriate units employed at other facilities operated by the company

> does not represent the kind of direct frontal attack on the problem demanded by *Oliver*.

104 L.R.R.M. at 3154 (footnote omitted).

In addition to the failure of the Enabling and Coal Lands Clauses to meet the vital concern test, they also fail the entrepreneurial control test. The clauses place a restraint on Amax's freedom to conduct its business and to dispose of its capital assets. In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972), this Court said:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

The Enabling and Coal Lands Clauses involve the same policy considerations underlying *Burns*. The clauses would have a direct and negative impact on Amax's ability to make managerial or entrepreneurial decisions. The clauses would have the effect of saddling Amax with the terms and conditions of employment which could make changes impossible and would discourage and inhibit the transfer of capital.

The Petitioners request that this Court defer to the Board's decision. This Court noted in *Pittsburgh Plate Glass* that:

> 'classification of bargaining subjects as 'terms [and] conditions of employment' is a matter concerning which the Board has special expertise.' Meat Cutters v. Jewel Tea, 381 U.S. 676, 685-686 (1965). The Board's holding in this cause, however, depends on the application of law to facts, and the legal standard to be applied is ultimately for the courts to decide and enforce. We think that in holding the 'terms and

> conditions of employment' of active employees to be *vitally* affected by pensioners' benefits, the Board here simply neglected to give the adverb its ordinary meaning.

404 U.S. at 182.

The Court of Appeals was correct in its review and decision. Therefore, this Court should reject the Petition.

III.
THE LEASING-LICENSING OUT CLAUSE INSISTED UPON BY PETITIONERS VIOLATES SECTION 8(b)(3) AND (e) OF THE ACT.

The Administrative Law Judge, Board and Court of Appeals found and held that Petitioners' insistence upon and strike for the Leasing-Licensing Out Clause were a refusal-to-bargain violation. They reasoned that the clause was not a mandatory subject for bargaining, but rather constituted an illegal subject. The clause sets forth:

> The employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this agreement or any section, paragraph or clause thereof.
>
> Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the work is performed by members of the United Mine Workers of America in the manner and to the extent permitted by law and that the licensing out does not cause or result in the layoff of employees of the Employer; provided, however, that either the licensor or licensee, lessee or sublessee makes the appropriate payments provided by this Agreement to the United Mine Workers of America Health and Retirement Fund and otherwise abide by the terms of the Agreement.

Section 8(e) of the Act proscribes "hot cargo" agreements, i.e., agreements where an object is to cause the employer to cease doing business with any other person. This Court's decision in *National Woodwork Manufactur-*

ers Association v. NLRB, 386 U.S. 612 (1967), sets the standards for the interpretation of Section 8(e). This Court pointed out in *National Woodwork* that (1) Section 8(e) was intended to supplement the existing prohibition against secondary boycotts, 386 U.S. at 633-34; (2) Section 8(e) embodied the same distinctions between lawful primary and unlawful secondary boycott activity, *Id.* at 638-39; and (3) Section 8(e) is violated if the agreement is tactically calculated to satisfy union objectives elsewhere, *Id.* at 644-45.

Applying these principles to the Leasing-Licensing Out Clause, the Board and Court of Appeals found that the clause promoted the union's interests generally and manifested a secondary objective; and, as such, did not preserve unit-employee work.

Petitioners allege that the Court of Appeals and Board misapplied the principles of *National Woodwork* in that inquiry was not made into the immediacy of application, the labor relations, and the circumstances of the employer and industry.

A review of the record below establishes that the Petitioners did not introduce evidence that the clause was intended to protect unit-employee work or standards. In addition, the clear and unambiguous language of the clause ("shall not be permitted unless the work is performed by members of the United Mine Workers . . .") demonstrates the secondary object. Further, when the clause is read in conjunction with the other clauses and the bargaining position of the Petitioner, it is clear that the Board and Court of Appeals correctly applied the principles of *National Woodwork*.

The restrictions on Amax in the clause, coupled with the restrictions in the Enabling and Coal Lands Clauses, would effectively encumber Amax's ability to do business (i.e., lease or license) since the clauses would force the lessee or licensee to comply with the union-recognitional requirements of the collective bargaining agreement. In the coal industry, the leasing, subleasing and licensing of coal lands

is a regular occurrence. The Leasing-Licensing Out Clause would preclude Amax from carrying on this necessary business, which directly affects Amax and the industry. Therefore, it is not designed to preserve unit work, but rather is a union-organizing device. The Board in *Commerce Tankers Corp.*, 196 N.L.R.B. 1100 (1972), *enf'd*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974), under a strikingly similar factual situation, found a violation of Section 8(e) because the union's contract clause was a union signatory clause and did not preserve unit work.

The Court of Appeals and the Board correctly applied the principles of the *National Woodwork* case and the congressional purpose of Section 8(e). Therefore, this Court should reject the Petition.

CONCLUSION

Among other arguments, the Petitioners and Board allege that by allowing the Court of Appeals' decision to stand, multiemployer trust funds will be seriously damaged. In making this argument, the Petitioners and the Board rely on conclusory statements, not the least of which would have this Court believe that the Court of Appeals has held that pension benefit bargaining is no longer a mandatory subject of bargaining. Hence, Petitioners apparently believe that single employer units would be precluded from participating in the multiemployer funds and thereby unable to share in the protection, stability and cost savings offered by such plans. Nothing is presented to support these statements; and, to the contrary, they are not supportable by the record and decisions. Amax had proposed its own benefit plans (i.e., single employer plan). Petitioners refused to consider Amax's proposal. Instead, Petitioners insisted that Amax participate in the multiemployer trust fund plans with the preselected trustees and without the right to appoint its own trustee-representative. In this context, violation of the Act was found by the Court of Appeals.

The Court of Appeals' decision does not change the well-established principle that an employer's contribution for pension and health and welfare benefits are a mandatory subject of bargaining. Nor does the decision preclude single employers from participating in the multiemployer plans as long as such employers are willing to participate and are satisfied with the management representative and/or the opportunity to engage in good-faith bargaining. In those instances, however, where the union attempts to dictate the management representative and refuses to negotiate the matter, then the employer is deprived of its right under Section 302(c)(5) of the LMRA to representation and such action is in violation of Sections 8(b)(1)(B) and 8(b)(3). This is especially true in the instant case where Petitioners attempted to force Amax to join a multiemployer association and designate it as its representative. Petitioners' refusal to negotiate in good faith Amax's proposals and insistence on Amax's participation in the BCOA funds with the attempted imposition of a preselected employer-trustee were in furtherance of this undisputedly illegal object. Petitioners' attempt to divorce this issue from the totality of its unlawful bargaining conduct should not be permitted. The record below clearly demonstrates Petitioners' failure to bargain in good faith, i.e., refusal-to-bargain conduct.

For the reasons set forth above, there is no basis for this Court to grant the Petitions for a Writ of Certiorari. There are no conflicts between the Courts of Appeals in the subject matters. Likewise, there are no conflicts between or within the federal statutes. In essence, the Petitions are grounded upon the Board's and the Petitioners' disagreement with the Court of Appeals' correct interpretation and application of the pertinent statutory provisions and case law. It is submitted that such disagreement is not sufficient to invoke the jurisdiction of this Court.

For the reasons hereinbefore set forth, it is submitted that the findings and reasoning of the Court of Appeals for the Third Circuit are correct. Amax, therefore, respectfully requests that the Petitions for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A
UNIONS' PROPOSED SICKNESS AND ACCIDENT BENEFITS AND PROPOSED HEALTH AND RETIREMENT BENEFITS

ARTICLE 11—SICKNESS AND ACCIDENT BENEFITS

* * * *

Section (f) Structure and Administration

The establishment, administration, and operation of the Sickness and Accident Benefits plan shall be the joint responsibility of the Employers and the Union.

Not later than March 1, 1975, the Trustees of the United Mine Workers of America Health and Retirement Funds as defined in Article 20 shall prepare and make available to the Employers and the Union a list of at least five (5) and initially not more than fifteen (15) acceptable insurance carriers, based upon scrutiny of model plans provided by the respective carriers and such other criteria as the Trustees may deem pertinent. Subsequent thereto, the Trustees may add additional carriers to the list at their discretion. Upon the approval of the Employers and the Union, but not later than April 1, 1975, this list shall be distributed to all signatory Employers. Not later than May 1, 1975, each Employer shall be solely and individually responsible for provision of the benefits set forth in this Article, either directly or through such of the acceptable insurance carriers as he may designate. If an Employer elects to provide benefits directly, he shall notify the Trustees and shall file with the Trustees an agreement to conform to the purposes and objectives of this Plan.

* * * *

The Trustees shall have the right to investigate fully any or all disputed claims in order to establish consistency of coverage and of the awarding of claims and benefits. Based upon such investigation, the Trustee shall, at the end of the first 12 months experience with this Plan, prepare a report to the Employers and the Union and shall, pursuant to such

report, prepare a revised list of acceptable insurance carriers, based upon the experience of the preceding year. The list may be further revised thereafter at the discretion of the Trustees. The Trustees shall have the power to remove any insurance carrier from the list for failure to provide the benefits described in this Article in a manner consistent with the terms of the Plan, and, in the event that an insurance carrier is so removed, it shall be the responsibility of any affected Employer to cancel any policy or policies he may have with any such disqualified insurance carrier, and to replace such policy or policies with a policy or policies provided by an acceptable insurance carrier, not less than 30 days after notification by the Trustees.

If, on the basis of their investigation of disputed claims, the Trustees find evidence that an Employer who elects to provide benefits directly has done so in a manner inconsistent with the terms of the Plan, the Trustees shall first inform such Employer and shall request that he establish coverage through any of the acceptable insurance carriers that he may designate. If the Employer fails to do so, and if the Trustees find that he is continuing to provide benefits in a manner inconsistent with the terms of the Plan, the Trustees may take such action as they deem necessary, including any and all legal means, to enforce compliance with the terms and objectives of the Plan.

* * * *

ARTICLE 20—HEALTH AND RETIREMENT BENEFITS

* * * *

Section (e) Responsibilities and Duties of Trustees

(1) Each Trust shall be administered by a Board of three Trustees, one of whom shall be appointed by the Employers; one of whom shall be appointed by the Union; and one of whom shall be a neutral party, selected by the other two. The Trustees, or their duly appointed successors, shall serve for the duration of the Agreement and as long thereafter as the proper continuation and administration of the

Trusts shall require. The representative of the Employers on the Board of Trustees shall be C. W. Davis, Bluefield, West Virginia; the representative of the Union on said Board of Trustees shall be Harry Huge, Washington, D.C.; and Paul R. Dean, Washington, D.C., is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Trusts.

(2) It is the intent and purpose of the contracting parties that full cooperation shall be given by each of them to one another, to the Trustees provided for under this Article, and to all affected mine workers, to the eventual coordination and development of policies and working agreements necessary or advisable for the effective operation of the Trusts and Plans.

(3) Action which may be required by the Employers in connection with any matter hereunder, including but not limited to the appointment of a successor Trustee, may be taken by those Employers who are parties to this Agreement, and authorization, approval or ratification of Employers representing fifty-one per cent (51%) or more of the total contributions made to the Trusts during the calendar year (or such shorter period which may have elapsed after the effective date of this Agreement) previous to that in which the action is taken shall be sufficient and shall bind all Employers.

(4) All covenants, rights and obligations accruing to the Trusts, and Benefit Plans, and the Trustees of the Pension and Benefit Trusts and Plans, and all breaches, violations and/or defaults of any provision of this Article pertaining to the Trusts and Plans, the Trusts Agreements, or Pension Plans, shall be enforced by the Trustees, at their discretion, through any and all available legal means, without first exhausting the grievance and arbitration procedures set

forth in this Agreement, and such Trustees shall determine whether any provision of this Article pertaining to the Trusts and Plans, the Trust Agreements or Pension Plans has been breached, violated or is in default.

* * * *

Section (h)[1] *Administration of Trusts*

(1) Each Employer shall make available to the Trustees within a reasonable time such information as the Trustees may determine to be reasonably required for the purpose of administering the Trusts and Plans.

(2) The Trustees shall respond to all written requests for information, applications and other communications from beneficiaries within 15 working days from their receipt at the office of the Trusts. A response from the Trustees may be either a telephonic communication or a letter acknowledging receipt of such communication from the beneficiary. A pension application must be initially approved or denied within 12 weeks of the receipt of the application. The foregoing shall not apply in the event of delays caused by conditions beyond the control of the Trustees.

(3) Within six months after the effective date of this Agreement, the Trustees shall develop a suitable plan for policing and monitoring the rolls of those entitled to benefits from the Trusts. On at least a quarterly basis, the Trustees shall have available a complete listing of current beneficiaries, identified by UMWA district and local union jurisdiction, if applicable. The Trustees shall promptly investigate and determine the eligibility or ineligibility of any beneficiary whose right to receive benefits from the Trusts has been challenged by an Officer of the International, District or Local Union or by any Employer. In the event that a beneficiary or beneficiaries shall be determined to be ineligible for health care or other benefits, the Trustees shall take prompt action to correct the situation.

---

[1] Redesignated "(g)" in UMWA subsequent proposals.

(4) Within six months after the effective date of this Agreement, the Trustees shall conduct a comprehensive review of procedures for monitoring covered medical expenses and shall report to the contracting parties with respect to insuring an effective system of cost controls, especially regarding any fees charged by physicians, hospitals, clinics, pharmacists or others which appear to be excessive. The Trustees shall take such steps as they deem appropriate to improve such procedures, and shall report to the contracting parties on such activities regularly thereafter, at least annually.

(5) The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

They are also authorized and directed, after adequate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:

(a) To conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder;

(b) to obtain determination letters from the Internal Revenue Service that the two Pension Trusts will each meet the requirements of Section 401 of the Internal Revenue Code and the Trusts thereunder will be exempt under Section 501(a) of such Code and that the two Benefit Trusts will be exempt under Section 501(c) (9) of such Code;

(c) to establish the deductibility for income tax purposes of any and all contributions made by the signatory operators to the Pension Trusts and Benefit Trusts as paid or incurred; or

(d) to comply with all applicable court or government decisions or rulings.

* * * *

No. 80-289

OCT 29 1980

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The facts of this case are described in detail in the government's petition for a writ of certiorari in *NLRB* v. *Amax Coal Co.*, petition for cert. pending, No. 80-692. Briefly stated, this case arises out of petitioners' unsuccessful collective bargaining negotiations with respondent Amax Coal Company regarding Amax's coal mining operations at its Belle Ayr Mine in Wyoming, and the resulting strike that commenced in January 1975. Prior to the strike, petitioners had bargained to impasse with regard to, *inter alia*, three proposed contract clauses: The first proposal would have required Amax to continue

contributing to petitioners' existing multi-employer pension and welfare trust funds on behalf of the employees at the Belle Ayr Mine; the second proposal would have required Amax to apply the collective bargaining agreement to all other coal mining operations acquired or initiated by Amax during the course of the agreement provided that petitioners first established that they were the legal bargaining representative of the employees of that other facility; and the third proposal would have required Amax to impose the collective bargaining agreement on all licensees or lessees of its coal lands. Petitioners seek review of the court of appeals' decision insofar as it held that they violated the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, by bargaining to impasse and striking with regard to those three clauses.

1. Petitioners contend (Pet. 15-21) that the court of appeals erroneously concluded that a management-appointed trustee of a multi-employer pension or welfare fund established pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c)(5), represents management as well as the beneficiaries of the trust, and that therefore such a trustee is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B). For the reasons stated in our petition for a writ of certiorari in No. 80-692, we believe that such a trustee owes an exclusive duty of loyalty to the trust beneficiaries and that at all events the trustee is not a collective bargaining representative for purposes of Section 8(b)(1)(B) of the NLRA. Because the court of appeals' contrary decision regarding this important issue misconstrues the language and purpose of the federal labor laws, and is at odds with the overwhelming weight of judicial authority, review by

this Court is warranted. Accordingly, we do not oppose the petition in this case limited to Question 1.

2. Petitioners also challenge (Pet. 21-26) the court of appeals' decision regarding the so-called Enabling and Coal Lands (or Application-of-Contract) Clauses. The Enabling Clause provides that "[t]his Agreement * * * covers the sub-bituminous coal or lignite mines owned or operated by [Amax]" (Pet. App. 101a, 210a), and the Coal Lands Clause states that "this agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term * * * " (*id.* at 101a, 210a-211a). In other words, these proposals would have required Amax to apply the terms of the Belle Ayr contract to other coal mines acquired or operated by Amax during the course of the collective bargaining agreement, provided that petitioner first became the legal bargaining representative of the employees at such other facilities (*id.* at 101a-103a, 210a-211a).

Relying on its prior decision in *United Mine Workers of America*, 231 N.L.R.B. 573, 576 (1977), rev'd *sub nom. Lone Star Steel Co.* v. *NLRB*, No. 77-1667 (10th Cir. July 28, 1980), slip op. 28-34, the Board determined that these clauses were mandatory subjects of bargaining, and that therefore the Union did not violate Section 8(b)(3) of the NLRA, 29 U.S.C. 158(b)(3), by bargaining to impasse and striking in support of these proposals (Pet. App. 212a-215a). The Board stated (Pet. App. 214a):

> [W]e conclude that both the enabling clause and the application-of-contract clause merely seek to preserve the employment opportunities of the employees in the existing unit by ensuring that the employees of any other operation put into

> production by [Amax] during the term of the proposed agreement, for whom the Union has obtained bargaining rights, will receive the same wages and benefits as the employees at the Belle Ayr Mine. In this manner, as the Board noted in *Lone Star Steel Company*, both clauses serve to "remov[e] the economic incentive which might otherwise encourage [Amax] to transfer . . . work to other mines under its control." Thus, it is manifest that both of the disputed proposals have a vital effect upon the terms and conditions of employment of the employees at the Belle Ayr Mine and therefore constitute mandatory subjects for bargaining.

The Board also found that the clauses would not require expanding the Belle Ayr bargaining unit to include employees at Amax's other facilities, but would merely require Amax to accept the same contract terms at the other facilities for the term of the contract; thereafter bargaining for a new contract could be conducted separately at the different facilities (Pet. App. 213a-214a).

The court of appeals reversed (Pet. App. 241a-244a). Although it recognized that "the Union has a valid concern in protecting the employees against a shift of production to another mine in order to evade the Union's standards and wages at Belle Ayr," the court held that the clauses proposed by petitioners were "much broader than necessary to accomplish this goal" (Pet. App. 243a). In particular, the court pointed out that the clauses would have required Amax to apply even the non-economic provisions of the Belle Ayr contract to its other facilities (*ibid.*).

The Board believes that the court of appeals should have deferred to the Board's view that the Enabling and Coal Lands Clauses are mandatory subjects of bargaining. The Board did not file its own petition with regard to this

issue, however, because the court of appeals accepted the principle that a proposal designed to protect the level of wages and working conditions within the bargaining unit by requiring the employer to maintain a comparable level of wages and working conditions elsewhere is a mandatory subject of bargaining (Pet. App. 243a-244a). Thus, the court of appeals disagreed with the Board only about whether the particular clauses proposed by petitioners in this case went beyond this legitimate purpose. But, should Question 2 of the petition for a writ of certiorari be granted, the Board will defend its decision and order on this issue.

3. a. Finally, petitioners challenge (Pet. 26-29) the concurrent ruling of the Board and the court of appeals regarding the validity of the so-called Leasing-Licensing Clause proposed by petitioners. That clause provides in pertinent part (Pet. App. 127a):

> Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the work is performed by members of the United Mine Workers of America in the manner and to the extent permitted by law and that the licensing out does not cause or result in the layoff of employees of the Employer; provided, however, that either the licensor or licensee, lessee or sublessee makes the appropriate payments provided by this Agreement to the United Mine Workers of America Health and Retirement Fund and otherwise abide by the terms of the Agreement.

The Board concluded that this proposal violates Section 8(e) of the NLRA, 29 U.S.C. 158(e), and that the Union therefore violated Section 8(b)(4)(A) and 8(b)(3) of the NLRA, 29 U.S.C. 158(b)(4)(A) and (b)(3), by

bargaining to impasse and striking in support of this proposal (Pet. App. 127a-135a). The Board found that the proposal was intended to require Amax to interfere with the labor relations of the employer to whom it licensed out its mining operation, by requiring that such an employer recognize petitioners, employ only their members, and abide by the terms of the Belle Ayr contract for its employees. In short, the clause had a secondary objective, designed to benefit petitioners' organizing goals rather than to preserve work for Amax's employees. See *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 644 (1967).

The court of appeals enforced this portion of the Board's order (Pet. App. 250a-251a). The court agreed that the restrictions contained in the clause would "serve[] only [petitioners'] organizing interests and does not protect the Amax employees' work standards" (*id.* at 251a). In addition, the court concluded that the clause would have required Amax to "cease doing business" with the licensee employer, within the meaning of Section 8(e). The court explained that "[s]ince the clause forbids Amax from licensing out coal mining operations absent compliance with the contract terms for the licensee's employees, Amax would be obliged to discontinue the licensing agreement if the licensee ever stopped recognizing [petitioners] or abiding by the other terms of [their] contract with Amax" (Pet. App. 251a).

b. The court of appeals correctly sustained the Board's determination that the particular Leasing-Licensing Clause at issue here violates Section 8(e) of the Act. As the court explained, "[t]he phrase 'doing business' [in Section 8(e)] refers to a continuing business relationship which is capable of being discontinued by one employer in order to force another employer to accede to union

demands" (Pet. App. 247a). And here, the Leasing-Licensing Clause contemplates a continuing landlord-tenant relationship between Amax and the licensee or lessee employer, which is capable of interruption by Amax in order to enforce petitioners' demands against that employer. In fact, the clause expressly renders Amax, the "licensor," jointly liable with the licensee for the latter's failure to make welfare fund contributions or otherwise to adhere to the collective bargaining agreement. In these circumstances, the courts of appeals have uniformly agreed that the proposed clause runs afoul of Section 8(e). See *Lone Star Steel Co.* v. *NLRB*, *supra*, slip op. 13; *NLRB* v. *Hotel & Restaurant Employees & Bartenders' Union Local 531*, 623 F. 2d 61, 66 (9th Cir. 1980).

Petitioners erroneously rely (Pet. 27-28) on cases involving true successorship clauses rather than the kind of Licensing-Leasing Clause at issue here. But a true successorship situation does not constitute "doing business" because there is a one time substitution of the purchaser for the seller as the operator of the same continuing business operation, rather than a continuing business relationship between, for example, a lessor and lessee. See, *e.g.*, *Lone Star Steel Co.* v. *NLRB*, *supra*, slip op. 9-27; *United Mine Workers of America*, *supra*, 231 N.L.R.B. at 574-575. Indeed, here, petitioners proposed both a successorship clause and a Licensing-Leasing Clause, and both the Board and the court of appeals, in accordance with well settled principles, found that the successorship clause, unlike the Licensing-Leasing Clause,

did not trench upon continuing business relationships in violation of Section 8(e). See Pet. App. 120a-127a, 246a-250a. Further review of this question is unwarranted.

Respectfully submitted.

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No. 80-289

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Petitioners

v.

NATIONAL LABOR RELATIONS BOARD AND
AMAX COAL COMPANY, A DIVISION OF AMAX, INC.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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November 1980

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QUESTION PRESENTED

Are trustees of multiemployer trust funds established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 "representatives for collective bargaining" within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act? *

---

* The National Labor Relations Board has also filed a petition for a writ of certiorari to review the judgment in this case. *See* NLRB v. Amax Coal Co., No. 80-692 (filed October 27, 1980). The Board's petition presents the same question that is presented here.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-289

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
AND UNITED MINE WORKERS OF AMERICA,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD AND
AMAX COAL COMPANY, A DIVISION OF AMAX, INC.
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE *

Amicus Curiae National Stabilization Agreement of the Sheet Metal Industry Trust Fund ("SASMI" or "the

---

* Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters manifesting such consent have been filed with the Clerk of the Court.

Fund") is a trust fund created pursuant to Section 302 (c) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c), and established in 1973 in accordance with collective bargaining agreements between local member unions of the Sheet Metal Workers' International Association ("SMWIA") and various sheet metal contractors and contractor associations. SASMI is currently administered by six trustees, half of whom are selected by labor and management, respectively. Approximately 25,000 sheet metal workers nationwide, employed by more than 2,500 companies, are participants in SASMI.

SASMI is a comprehensive, unified supplemental employment compensation plan developed in light of the unique needs of the sheet metal industry. The Fund is a separate entity, organized and administered independently of SMWIA and the employers, and operated for the sole and exclusive benefit of its participants and beneficiaries. SASMI was created to foster the economic welfare and security of employees in an industry vulnerable to economic instability; its primary goal is to minimize hardships caused by factors beyond the control of employees. To this end, benefits are paid to supplement in part the loss of wages incurred during periods of less than full employment. To date, SASMI has paid close to $43 million of these unemployment and related benefits to needy sheet metal worker beneficiaries and their families.

The continued administration of the SASMI Trust Fund was recently put in issue when an association of employers filed unfair labor practice charges against the Sheet Metal Workers' International Union, its President, and Local 493, the local union with which the association had signed a collective bargaining agreement, contending that these parties had violated Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, by

insisting on SASMI and striking to ensure that the employers would include SASMI participation as one of the benefits of the contract. On review of those unfair labor practice charges, the National Labor Relations Board rejected the very contention accepted by the Third Circuit in the instant proceeding—that trustees of a multiemployer trust fund are representatives for purposes of collective bargaining. *Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238 (1978).

The Board's decision is currently under review before the United States Court of Appeals for the Fifth Circuit, which heard argument on the issue on October 29, 1980. The legal issues at stake in the Fifth Circuit litigation concern the orderly administration—indeed the existence —of SASMI and other multiemployer trust funds, and for that reason SASMI sought, and was granted, leave to file an Amicus Curiae brief in the Fifth Circuit. Since one of the issues raised in the instant petition is identical with the issue that SASMI addressed in the Fifth Circuit litigation, SASMI also seeks to participate as an amicus in this Court to urge review of this important question concerning the interrelationship of statutory schemes governing labor relations and fiduciary duties of trust funds, and reversal of the Third Circuit's decision in this case.

SUMMARY OF ARGUMENT

The Third Circuit has decided important questions concerning federal labor and trust fund statutes in a manner inconsistent with congressional intent and likely to disrupt the orderly administration of multiemployer trust funds. Indeed, the legislative history of the recently enacted Multiemployer Pension Plan Amendments Act of 1980 evidences explicit congressional disapproval of the Third Circuit's decision here at issue, and provides an indication of the disruptive impact of this decision in

the important area of administration of labor-management trust funds.

The Third Circuit erred in holding that fund trustees are "representatives for collective bargaining" within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act. The duties of trustees appointed by labor and management to administer a joint labor-management trust fund differ dramatically from those of collective-bargaining agents appointed by labor and management. It is clear from the legislative history of the LMRA that Section 8(b)(1)(B) was not intended to encompass trust fund administration. The duties imposed on collective bargaining representatives cannot be reconciled with those of fund trustees and, indeed, are antithetical to the fiduciary obligations assumed by fund trustees.

Fund trustees are fiduciaries under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and their sole responsibility is to the participants and beneficiaries of the trust fund. Clearly Congress did not intend that a trustee serve two masters: a trustee cannot exercise undivided loyalty to the trust fund participants and beneficiaries and at the same time be completely faithful to his appointing party, as Section 8(b)(1)(B) would require. The Third Circuit's decision thus poses a grave threat to the proper and orderly administration of labor-management trust funds, and it should be reversed.

ARGUMENT

I. The Petition Should Be Granted Because The Decision Below Conflicts With Decisions Of This Court And Lower Federal Courts As To Congressional Intent In Enacting Section 8(b)(1)(B) Of The National Labor Relations Act.

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of col-

lective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B). As this Court emphasized in *Florida Power & Light Co.* v. *IBEW Local 641*, 417 U.S. 790 (1974), in enacting this provision Congress was "exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment." *Id.*, at 803. Finding no indication of an intent to go beyond this "clearly focused congressional concern," *id.*, this Court there rejected the National Labor Relations Board's broader interpretation of the statute to proscribe union discipline of supervisor members who had crossed picket lines to perform nonsupervisory functions during strikes. *Florida Power & Light* necessitates review of the decision below, which would require the Board to interpret Section 8(b)(1)(B) much more broadly than it had in that case.

As this Court recognized in *Allied Chemical Workers Local 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971), "the union's role in the administration of the fund is of a far different order from its duties as collective-bargaining agent." Under the federal labor laws, the term collective-bargaining identifies a process that "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). *See also NLRB* v. *Boss Manufacturing Co.*, 118 F.2d 187, 189 (7th Cir. 1941). No such process is involved in the administration of trust funds. Here, the agreement already has been reached, and the responsibility of the trustees is to administer the fund in accordance with its terms and in the sole interest of its participants and beneficiaries.

Similarly, the right to strike to insist on acceptance of mandatory subjects of bargaining is at the "core" of the collective bargaining process contemplated by Congress. *Division 1287, Amalgamated Association of Street*

Employees v. *State of Missouri*, 374 U.S. 74, 82 (1963). No such adversarial resolution is contemplated in the case of Section 302 trust funds, however. To the contrary, Section 302 specifically requires that these funds provide for the resolution of deadlocks in questions of fund administration by a neutral person or impartial umpire appointed by the trustees or the court, 29 U.S.C. § 186(c)(5)(B).

It is thus not surprising that the Court of Appeals for the Ninth Circuit rejected an earlier attempt to analogize the process of trust fund administration to collective bargaining "as not supported by authority." *Rehmar* v. *Smith*, 555 F.2d 1362, 1370 (9th Cir. 1976) (footnote omitted.)[1] Logic and precedent compel the same conclusion here.

The essence of a Section 8 collective bargaining representative is total loyalty to the party he represents.

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[1] The Third Circuit's position will produce a number of disruptive consequences. For example, if trust fund administration constitutes "collective bargaining," it would follow that the trustees' activities are subject to Board regulation under Sections 8(a)(5), 8(b)(3) and 8(d) of the NLRA, thus thrusting the Board into an area that Congress has not committed to it. *Cf.* Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 499 (1960).

Similarly, Sections 405(a)(3) and 405(b)(1)(A) of ERISA, 29 U.S.C. §§ 1105(a)(3), (b)(1)(A), impose an obligation on a trustee to prevent any other trustee from breaching his fiduciary responsibilities to the employee beneficiaries. But it is a violation of Section 8(b)(1)(B) of the NLRA for a union representative to interfere with the employer's collective bargaining agent's performance of his duties in accord with the employer's instructions. American Broadcasting Companies v. Writers Guild, 437 U.S. 411, 436 (1978). Thus, if trustees are "representatives" of their appointing parties in ongoing "collective bargaining," a labor-appointed trustee might commit an unfair labor practice merely by fulfilling his obligation under ERISA to prevent an employer-appointed trustee from breaching his fiduciary responsibilities.

"The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires." *Local No. 2150, IBEW*, 192 N.L.R.B. 77, 78 (1971). The Third Circuit's decision in this case appears to recognize that the fund trustees owe some fiduciary obligations to the fund's participants and beneficiaries, but maintains that the trustees are required to advance the interests of the parties appointing them "[i]nsofar as it is consistent with their fiduciary obligations." *Amax Coal Co.* v. *NLRB*, 614 F.2d 872, 882 (3d Cir. 1980). Clearly Section 8(b)(1)(B) does not contemplate or permit such divided loyalties, and labor-management trust funds cannot be properly administered if a trustee must constantly guess as to which party he is representing on a particular issue, or the extent to which the interests of the fund's beneficiaries can be compromised or accommodated with the narrower interests of that trustee's appointing party.[2]

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[2] The disruptive impact of analogizing trust fund administration to ongoing collective bargaining has been perceptively noted by former Judge Renfrew:

> "The function of pension fund trustees is significantly different from the roles of union and management in ordinary labor affairs such as contract negotiations or grievance matters. The duty of fair representation is imposed upon a union because by law it is the exclusive representative of the bargaining unit. Pension fund trustees, on the other hand, are not advocates; they are fiduciaries. All trustees, labor and management representatives alike, have a duty to take those actions which they believe to be in the best interests of the fund's beneficiaries.
>
> Although the requirement of equal representation among trustees might suggest that a pension fund board is expected to function in an adversarial way, few things could be more inimical to the proper management of a pension fund. A pension fund must not be administered on the assumption that the excesses of labor and management trustees will cancel each other out. To the extent that the present requirements

It is clear that Congress did not intend the incongruous results that will be produced by the Third Circuit's decision. Joint trust funds had been in operation for more than 25 years when Congress enacted ERISA, and Congress obviously is familiar with the collective bargaining process and with the undivided loyalties that the parties demand of their collective bargaining representatives. It defies logic to suggest that Congress would have enacted the strict fiduciary standards of ERISA if it thought that the trustees of such funds also owed the obligations to their appointing parties that Section 8(b)(1)(B) would impose if they were collective bargaining representatives.

The legislative history of the recently enacted Multiemployer Pension Plan Amendments Act of 1980 reveals that Congress harbored no such intent, and that it anticipates that the Third Circuit's opinion in this case will be reversed. For example, Senator Randolph referred specifically to the decision below, expressed the opinion that the case would be "overturned on appeal," and asked whether Congress had "ever expressed an intent under ERISA or any other Federal law that an agency status should or does exist between trustees and their appointers." 126 Cong. Rec. S 10104 (daily ed. July 29, 1980). Senator Williams, the sponsor of the 1980 amendments, responded that "[i]n all instances the actions of the trustees must be made with the sole interests of the plan's beneficiaries in mind." *Id.* Similarly, in the House, Congressman Thompson referred to the Third Circuit decision as "an erroneous interpreta-

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of § 302 encourage this attitude, Congress should consider amending the statute."

Morgan v. Laborers Pension Trust Fund, 433 F.Supp. 518, 530 (N.D. Cal. 1977) (footnote omitted). *See also* Renfrew, *Fiduciary Responsibilities Under the Pension Reform Act*, 32 Bus. Lawyer 1829 (1977).

tion of both ERISA and federal labor law [which] does not reflect congressional intent." 126 Cong. Rec. H 7902 (daily ed. August 26, 1980). These recent expressions of legislative intent, although not determinative with respect to the purpose of earlier legislation, are clearly a relevant consideration, especially since the recent amendments are "another major step in an evolving pattern of regulation." *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 194 (1967).

Finally, it is important to recognize the logical impact of the Third Circuit's holding that fund trustees are Section 8 representatives of their appointing parties for collective bargaining purposes. Section 8(b)(1)(B) reflects a congressional intent to preclude union coercion in the employer's selection of his bargaining representatives. *Florida Power & Light Co., supra.* If the trustees of Section 302 trusts were deemed to be representatives for collective bargaining purposes, it logically would follow that a union could not insist on any individual employer's participation in a multiemployer fund unless that employer were given the right to select each and every employee trustee, and the same right would have to be afforded each successive employer joining the fund. As a practical matter, this would eliminate collectively-bargained multiemployer trust funds altogether since each employer could insist on powers to appoint all employer representatives that would render fund operation impossible. That result is clearly at odds with congressional intent.[3]

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[3] Multiemployer funds offer stability and other economic advantages that cannot be obtained by smaller plans, and Section 302 clearly contemplates multiemployer funds, stating that its provisions shall not prohibit payments "to a trust fund established . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents (*or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and depend-*

The courts have recognized that the equal representation requirement of Section 302 does not mean that each employer contributing to a welfare and pension fund has the right to select its trustees. *See e.g., Denver Metropolitan Association* v. *Journeyman Plumbers Local 3*, 586 F.2d 1367, 1374-75 (10th Cir. 1978); *Associated Contractors of Essex County, Inc.* v. *Laborers International Union*, 559 F.2d 222, 227 (3d Cir. 1977); *Blassie* v. *Kroger Co.*, 345 F.2d 58, 72 (8th Cir. 1965); *Mechanical Contractors Associations* v. *Huico, Inc.*, 93 L.R.R.M. 2329 (W.D. Wash. 1976); *Local 169, International Brotherhood of Teamsters* v. *Teamsters Health & Welfare Fund*, 327 F.Supp. 260, 264 (E.D. Pa. 1971). *See also Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238, 1244-1245 (1978), petition for review pending *sub nom. Central Florida Sheetmetal Contractors Ass'n* v. *NLRB*, No. 79-2396. It would be most inappropriate to impose such a requirement through Section 8(b)(1)(B).

II. The Petition Should Be Granted Because The Decision Below Conflicts With The Decisions Of Other Federal Courts Holding Fund Trustees To Be Fiduciaries Whose Sole Responsibility Is To The Participants And Beneficiaries Of The Trust Fund.

Under the provisions of ERISA, fund trustees are fiduciaries,[4] whose obligation under Section 404 is to

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ents) . . . ." 29 U.S.C. § 186(c)(5) (emphasis added). Similarly, ERISA made specific provision for multiemployer plans. *See e.g.*, Internal Revenue Code § 414(f), 26 U.S.C. § 414(f); 29 U.S.C. § 1002(37).

[4] Section 3 of ERISA, 29 U.S.C. § 1002(21), estabilshes that each fund trustee is a fiduciary, providing in pertinent part:

> (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any

act "solely in the interest of the participants and beneficiaries" of the fund. 29 U.S.C. § 1104(a)(1). *See also, id.*, § 1106(b)(2). This statutory obligation, which likewise is recognized in the common law, *Blankenship* v. *Boyle*, 329 F.Supp. 1089, 1094 (D.D.C. 1971), tolerates no divided loyalties of the kind mandated by the decision below. *Cf. NLRB* v. *Construction & General Laborers' Local 1140*, 577 F.2d 16, 21 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979); *Blassie* v. *Kroger Co.*, *supra*, 345 F.2d at 75-76.

The duties set forth in Section 404 of ERISA reflect a federal codification and elaboration of the common law prudent man rule and the requirement of undivided loyalty to the trust beneficiaries. Clearly a fund trustee cannot serve two masters: he cannot exercise undivided loyalty to the trust fund participants and beneficiaries and at the same time be completely faithful to the party that appointed him, as Section 8(b)(1)(B) would require if he also were a collective bargaining representative.[6]

> authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Thus, the very discretion suggested by the Third Circuit as a basis for its decision that fund trustees are "representatives" in an ongoing collective bargaining process has precisely the opposite effect: it conclusively establishes that they are fiduciaries under ERISA. *See also* Department of Labor ERISA Interpretive Bulletin, 29 C.F.R. § 2509.75-8, 40 Fed. Reg. 47491 (October 9, 1975).

[6] Judge Gesell highlighted this point in Blankenship v. Boyle, *supra*, 329 F.Supp. at 1094, by quoting with approval the following comment of counsel:

> You can't be just a little bit loyal. Once you are a trustee, you are a trustee, and you cannot consider what is good for the Union, what is good for the operators, what is good for the Bank, anybody but the trust.

The Courts of Appeals for the District of Columbia and Ninth Circuits have rejected the position adopted by the Third Circuit. For example, in *Miniard* v. *Lewis*, 387 F.2d 864, 865 n. 5 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968), the United States Court of Appeals for the District of Columbia Circuit rejected the contention that union-appointed fund trustees owed a duty to represent the interests of all employees in the bargaining unit, stating:

> Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employers or the union. Accord, United Marine Division v. Essex Transportation Co., 216 F.2d 410, 412 (3rd Cir. 1954).

The District of Columbia Circuit subsequently addressed the Third Circuit's essential position more directly in *Lamb* v. *Carey*, 498 F.2d 789 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 869 (1974). While recognizing that trusts established in accordance with the LMRA must allow for equal representation of employers and employees in their administration, the court squarely rejected the notion that the statutory equal representation requirement compromised each trustee's fiduciary obligation to administer the fund solely in the interests of its beneficiaries:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries. However, the District Court . . . made the unchallenged finding that '[c]lose collaboration with the Union is required in an atmosphere of mutual confidence to further the objectives and the effectiveness of the Fund.' This places an even more stringent requirement on the actions of a

> Union Trustee, a requirement which is here of crucial importance.

498 F.2d at 793. Accordingly, the court of appeals admonished that the union could not replace a union-appointed trustee merely because it disliked him, *id.*, as it might if that trustee were simply its own representative.

The Court of Appeals for the Ninth Circuit has similarly concluded that fund trustees have a duty to exercise "independent judgment" in matters of trust administration, a conclusion plainly at odds with the Third Circuit's imposition of Section 8(b)(1)(B) duties on fund trustees. *See Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975):

> We wish to emphasize, however, that trustees have a duty to exercise their independent judgment in administering trust funds established under § 302 of the Labor Management Relations Act. Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory.

Finally, it should be noted that the decision below is also at odds with earlier Third Circuit decisions in *United Marine Division* v. *Essex Transportation Co.*, 216 F.2d 410 (3d Cir. 1954), and *Mechanical Contractors Association* v. *Local Union 420*, 265 F.2d 607 (3d Cir. 1959).[6]

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[6] In *United Marine Division, supra*, the Third Circuit rejected the contention that union-appointed trustees were "representatives of . . . employees" within the meaning of Section 302 of the LMRA, stating:

> We think that in this instance the promise of the employer . . . was not a promise 'to any representatives of any of his employees.' The promise alleged was to pay these trustees. These trustees were not, in our judgment, representatives of

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1980

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the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out.

216 F.2d at 412 (footnote omitted). That position was reaffirmed in *Mechanical Contractors Association, supra,* where the Third Circuit explained that a person designated by a union in a fund meeting the standards of Section 302(c)(5) is not a "representative" within the meaning of that section, and thus that employer payments to such funds are not in violation of Section 302. 265 F.2d at 611.

No. 80-289

SEP 26 19
MICHAEL RODAK, JR.,

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ON WRIT OF CERTIORARI TO
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OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONER

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and Retirement Funds

QUESTION PRESENTED

Whether the trustees of multiemployer trusts established pursuant to Section 302(c)(5) of the Labor-Management Relations Act, 1947, 29 U.S.C. §186(c)(5), function in the administration of those trusts as collective bargaining representatives of the parties who appoint them.

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OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Amicus curiae is the Board of Trustees of the United Mine Workers of America ("UMWA") Health and Retirement Funds ("Funds"). The Funds is the collective name for four irrevocable multiemployer trust funds established by the UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA") in Article XX of the National Bituminous Coal Wage Agreement of 1974 ("1974 Wage Agreement"), pursuant to, and within the scope of, Section 302(c)(5) of the Labor-Management Relations Act, 1947, 29 U.S.C. §141 *et seq.* (1978)("LMRA"). The four trusts are the UMWA 1950 Pension Trust, the UMWA 1974 Pension Trust, the UMWA 1950 Benefit Trust, and the UMWA 1974 Benefit Trust ("Trusts"). Article XX of the National Bituminous Coal Wage Agreement of 1978 ("1978 Wage Agreement") provides for the continuation of the Trusts as amended by the UMWA and the BCOA. The Trusts are employee benefit plans within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1002(3)(1978).

Article XX, Section (e) of the Wage Agreements provides for the administration of the Trusts by a Board of three Trustees appointed for the duration of the Wage Agreements and subject to removal only for cause. Pursuant to the Wage Agreements, and in accordance with Section 302(c)(5)(B) of the LMRA, 29 U.S.C. §186(c)(5)(B), one Trustee is appointed by the UMWA, one by the BCOA, and the third, a neutral, by the other two. The current Trustees of the Funds are Harrison Combs, Chairman, appointed by the UMWA; John J. O'Connell, appointed by the BCOA; and Paul R. Dean, the neutral Trustee. The powers and responsibilities of the Trustees are enumerated in the Trust documents. Under those documents, the Trustees have full discretionary authority to manage and control Trust assets. In that respect, the Trustees are plan fiduciaries within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. §1002 (21)(A). Accordingly, the fiduciary duties imposed by Section 404 of ERISA, 29 U.S.C. §1104, and the prohibitions of Section 406 of ERISA, 29 U.S.C. §1106, fully apply to the Trustees. A Trustee who breaches the fiduciary obligations imposed by those provisions is personally liable under Section 409

of ERISA, 29 U.S.C. §1109, for any resultant losses to the Trust. Under Section 405 of ERISA, 29 U.S.C. §1105, a Trustee is also liable for a breach of fiduciary duty by a co-Trustee, if he has knowledge of the breach.

The Third Circuit has decided that the UMWA and BCOA Trustees of the Funds (hereinafter "the Trustees") are representatives of their appointing parties for the purposes of collective bargaining within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(b)(1)(B). The Trustees, however, cannot assume that status consistent with the requirements of Sections 404 and 406 of ERISA, 29 U.S.C. §§1104 and 1106. Consequently, the decision of the Third Circuit places the Trustees in a virtually untenable position. Indeed, the decision exposes the Trustees to substantial liability under Sections 405 and 409 of ERISA, 29 U.S.C. §§1105 and 1109. Clearly, the Trustees have a serious interest in having the Supreme Court review that decision.

STATUTORY PROVISIONS INVOLVED

The following provisions of ERISA are relevant to the interests of the amicus curiae in this action:

29 U.S.C. §1104(a)(1)

Section 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries. . . .

29 U.S.C. §1105(a)(3)

Section 405. (a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

. . .

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. §1106(b)(2)

Section 406. (b) A fiduciary with respect to a plan shall not —

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . .

29 U.S.C. §1109

Section 409. (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

STATEMENT OF THE CASE

The UMWA, petitioner herein, is an industrial union that represents bituminous coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration.

The respondent, Amax Coal Company, a division of AMAX, Inc. ("Amax"), operates several bituminous coal mines in the midwestern United States. With regard to those mines, Amax is a member of the BCOA, an employers' association which represents bituminous coal operators for purposes of collective bargaining and contract administration. Amax, however, also operates a western subbituminous mine. That mine is not within the scope of the BCOA's representation.

In 1974, the UMWA and the BCOA engaged in collective bargaining negotiations which resulted, on December 6, 1974, in the 1974 Wage Agreement, and the establishment therein of the four trust funds, known collectively as the Funds. As a member of the BCOA, Amax participated in the negotiations leading to

the Wage Agreement and had a voice in the selection of the BCOA Trustee.

Amax's western subbituminous mine was not covered, however, by the 1974 Wage Agreement. Nor was the mine covered by the Western Surface Coal Mine Wage Agreement of 1975 ("Western Agreement"), a separate agreement negotiated by the UMWA and an employer association representing western subbituminous and lignite mines. Instead, Amax and the UMWA negotiated directly for an agreement covering Amax's western mine. This case arose from those negotiations.

Included in the contract proposals submitted by the UMWA was a provision known as the "Trustee Clause." The Trustee Clause would have required Amax to participate in the Funds. Amax repeatedly objected to this Clause, on the basis that the Funds' management Trustee had already been selected, pursuant to the 1974 Wage Agreement. The UMWA, however, insisted to impasse upon the Trustee Clause.

In Amax's view, the UMWA's insistence upon the Trustee Clause constituted coercion in its selection of a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the NLRA. Accordingly, in January, 1975, Amax filed unfair labor practice charges against the UMWA and Local 1854 with the National Labor Relations Board ("Board"). Thereafter, the Director of Region 27 of the Board issued an amended consolidated complaint on behalf of the General Counsel of the Board. The complaint alleged, *inter alia,* that the UMWA had engaged in an unfair labor practice within the meaning of Sections 8(b)(1)(B) and 8(b)(3) of the NLRA by insisting to impasse on the Trustee Clause.

A hearing on the charges was held on various dates in June and July of 1976, before an Administrative Law Judge. On March 22, 1977, the Judge issued a decision concluding, in relevant part, that the Funds' Trustee appointed by the BCOA is not a representative for purposes of collective bargaining as that term is used in Section 8(b)(1)(B) of the NLRA, and recommending the dismissal of that part of the complaint which alleged that the UMWA had violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA by insisting that Amax participate in the Funds even though the Company had not selected the Trustee. The Board affirmed this finding and recommendation as part of its decision

and final order issued on September 29, 1978.

Amax and the UMWA petitioned the Third Circuit for review of the Board's entire decision and order. The Board petitioned the Third Circuit for enforcement of its order. Amax intervened in the UMWA petition, and the UMWA intervened in that of Amax. The cases were subsequently consolidated on appeal.

The case was argued before Circuit Judges Gibbons and Higginbotham and District Judge Ziegler of the United States District Court for the Western District of Pennsylvania. The decision of the Court, in which Judge Gibbons did not participate, appears in an opinion written by Judge Higginbotham and filed on February 1, 1980. That decision reverses, in part, the decision of the Board, by holding that the Trustees of the Funds are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA, and that the UMWA's insistence to impasse upon the Trustee Clause, therefore, violates Sections 8(b)(1)(B) and 8(b)(3) of the NLRA.

The UMWA, Amax and the Board each petitioned the Third Circuit for rehearing *en banc*. The petitions were denied on May 29, 1980. The UMWA petition for a writ of certiorari followed. Amicus curiae support that part of the UMWA petition which requests the Supreme Court to review the Third Circuit's decision that the Trustees are collective bargaining representatives.

SUMMARY OF ARGUMENT

That part of the decision of the Third Circuit which holds that the Trustees of the Funds are collective bargaining representatives conflicts with existing law and Congressional intent. Therefore, it should be reviewed by the Supreme Court.

The Congressional purpose in enacting Section 302(c)(5) of the LMRA was to ensure that collectively bargained employee benefit funds were established and administered as legitimate trust funds, free from the labor-management politics inherent in collective bargaining. Indeed, the courts that subsequently construed Section 302(c)(5) invariably concluded that the trustees of funds established thereunder may not act solely in the interest of their appointing parties, as collective bargaining agents are required to do. Instead, the courts have consistently found that

such trustees have an independent and overriding fiduciary duty to act solely in the interest of the beneficiaries of the trust funds they administer.

ERISA does not change the rule under Section 302(c)(5) of the LMRA. Certainly, if Congress had intended trustees of funds established under Section 302(c)(5) to act as collective bargaining representatives, it would have enacted a different standard of duty. Congress chose, however, to adopt the rule that trustees owe undivided loyalty to the beneficiaries of the trusts they administer. 29 U.S.C. §1104(a)(1)(A)(i). Indeed, Section 406 of ERISA, 29 U.S.C. §1106(b)(2), specifically prohibits trustees from assuming loyalties which prevent them from acting exclusively for the benefit of trust beneficiaries.

The two-judge panel of the Third Circuit ignored these provisions, and misconstrued the judicial decisions which they affirm, in erroneously deciding that trustees of funds established under Section 302(c)(5) are collective bargaining representatives of the parties who appoint them. Therefore, the UMWA petition for a writ of certiorari should be granted.

ARGUMENT

The Supreme Court should grant the petition for a writ of certiorari because the decision of the Third Circuit is in conflict with existing law and contrary to the intent of the Congress.

Section 302(c)(5) of the LMRA requires that employers and employees be equally represented "in the administration of" the trusts established thereunder. 29 U.S.C. §186(c)(5)(B). The Section refers to the trustees of such trusts as "representatives" of the employers and employees who appoint them. *Id.* The Third Circuit construed the term "representatives" under Section 302(c)(5) to be "representatives for the purposes of collective bargaining" under Section 8(b)(1)(B) of the NLRA, 29 U.S.C. §158(b)(1)(B). Trustee representation of employers and employees "in the administration of" a Section 302(c)(5) trust is not, however, tantamount to representation "for purposes of collective bargaining" within the meaning of Section 8(b)(1)(B) of the NLRA, 29 U.S.C. §158(b)(1)(B). This is readily apparent from

the purpose of Section 302(c)(5) as revealed by the legislative history.

The legislative history of Section 302(c)(5) does not specifically address the duties and responsibilities of trustees who administer trust funds established thereunder. It reveals, however, that the sole purpose of the provision is to ensure that employee welfare funds are established as "legitimate trust funds," free of the abuses inherent in unilateral union administration. 93 Cong. Rec. 4678, 4746-7 (1947); *see also* 93 Cong. Rec. 3562-66, 3634 (1947); *United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co.*, 216 F.2d 410, 411-12 (3d Cir. 1954); *Blankenship v. Boyle*, 329 F.Supp. 1089, 1094-95 (D.D.C. 1971). Consistent with that purpose, Congress provided that payments to welfare funds would be permitted only if the payments were held in trust for the "sole and exclusive benefit of the employees," and employers and employees were equally represented "in the administration of the trusts." *Id.;* 29 U.S.C. §186(c)(5). It is obvious that Section 302(c)(5) was "designed expressly to isolate . . . welfare funds from labor-management politics." *Blankenship v. Boyle, supra,* 329 F. Supp. at 1094. Consistent therewith, Congress did not intend trustees of such funds to be collective bargaining representatives. Rather, they were intended to act as fiduciaries in the sole interest of the beneficiaries.

Any doubt about this fact is resolved by the judicial decisions construing the term "representatives" in Section 302(c)(5). Significantly, after considering the legislative history of Section 302(c)(5), the Third Circuit concluded in an earlier case that:

> These trustees [of a Section 302(c)(5) trust fund] were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. [*United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412.]

Based upon that conclusion, the Court held that payment to the trustees of a Section 302(c)(5) welfare fund by an employer who

was not a member of the employer association which appointed the management trustee was not an illegal payment to "any representative" of the employers' employees within the meaning of Section 302(a) of the LMRA. *Id.* at 413.

The District Court for the District of Columbia similarly construed the legislative intent of Section 302(c)(5) in a case involving the Trustees of the UMWA Welfare and Retirement Fund of 1950 ("1950 Fund"), the predecessor of the Funds. In *Blankenship v. Boyle, supra,* the Court rejected the argument that trustees, as "representatives" of labor and management, may act in the interest of their appointing parties and expressly found that:

> . . . there is nothing in the Labor-Management Relations Act or other federal statutes or in their legislative history which can be said to alleviate the otherwise strict common-law fiduciary responsibilities of trustees appointed for employee welfare or pension funds developed by collective bargaining. [*Blankenship v. Boyle, supra,* 329 F. Supp. at 1094. *Accord, United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412.]

Based on that rationale, the Court held that the Trustees of the 1950 Fund breached their fiduciary duty by failing to act in the exclusive interest of the beneficiaries of the Fund. *Id.* at 1094-95.

In *Miniard v. Lewis,* 387 F.2d 864 (D.C.Cir. 1967), *cert denied,* 393 U.S. 873, another case involving the Trustees of the 1950 Fund, the District of Columbia Circuit rejected a claim of unfair representation against the UMWA Trustee on the basis that the Trustee was not a collective bargaining representative. In rejecting the claim, the Court stated:

> Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employers or the union. [*Miniard v. Lewis, supra,* 387 F.2d at 865, note 5.]

Other courts have similarly delimited the scope of the trustees' representative capacity. As "representatives," trustees may con-

sider and, in their discretion, adopt recommendations of the collective bargaining parties "pertinent to effective administration of the [f]und." *Toensing v. Brown,* 528 F.2d 69, 72 (9th Cir. 1975). Trustees, however, may not be bound by those recommendations. *Toensing v. Brown, supra,* 528 F.2d at 72; *Lamb v. Carey,* 498 F.2d 789, 794 (D.C.Cir. 1974); *see also Miniard v. Lewis, supra,* 387 F.2d at 865, note 5; *United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412. That is because trustees, as fiduciaries, are bound to exercise independent judgment in administering trust funds established under Section 302(c)(5). They must, in all instances, act solely in the interest of the beneficiaries of the funds. *Id.* Indeed, they may not be removed by their appointing parties except for breach of fiduciary duty. *Lamb v. Carey, supra,* 498 F.2d at 794.

Lamb v. Carey, supra, well illustrates the relationship between a trustee's representative and fiduciary capacities. In that case, the District of Columbia Circuit recognized that communication between a trustee and his appointing party is essential to informed decisions in the best interests of the trust beneficiaries. Accordingly, the Court affirmed a district court decision and order removing the UMWA Trustee of the 1950 Fund solely because his intense political antagonism toward the UMWA management precluded him from representing the UMWA effectively. In doing so, however, the Court emphasized that:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries. [*Lamb v. Carey, supra,* 498 F.2d at 793.]

These decisions make it perfectly clear that the duties of "representative" trustees of funds established pursuant to Section 302(c)(5) are diametrically opposed to those of collective bargaining representatives. Collective bargaining representatives are bound as agents of their appointing parties to follow the instructions and act in the sole interest of the parties who appoint them. They are compensated by those parties and are subject to removal for any reason at all. *See Sheet Metal Workers International Association,* 234 N.L.R.B. 1238, 1247 (1978), *pet. for review pending* (5th Cir., No. 79-2396). Under

Section 302(c)(5), however, trustees are bound as fiduciaries to exercise independent judgment and to act solely in the interests of the beneficiaries of the funds they administer. They are compensated, if at all, by the trusts, and may be removed only for cause.

ERISA does not change the law under Section 302(c)(5). If Congress had intended the trustees of Section 302(c)(5) trust funds to act as collective bargaining representatives, ERISA would have provided different standards of duty. Section 404 of ERISA, however, reaffirms the judicial decisions under Section 302(c)(5). 29 U.S.C. §1104(a)(1)(i). This is apparent from statements made by Senators Randolph and Williams and Representative Thompson during full Senate and House consideration of the Multiemployer Pension Plan Amendments Act of 1980. 119 Cong. Rec. S 10104 (daily ed. July 29, 1980) (remarks of Senators Randolph and Williams); 126 Cong. Rec. H 7902 (daily ed. August 26, 1980) (remarks of Rep. Thompson).

Any doubt about this fact is resolved by Section 406(b)(2) of ERISA, 29 U.S.C. §1106(b)(2), and its legislative history. Section 406 provides:

> (b) A fiduciary with respect to a plan shall not —
>
> . . . .
>
> (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . . [29 U.S.C. §1106(b)(2).]

According to the joint explanatory statement of the Committee on Conference, this prohibition

> prevents a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.

[Conference Report No. 93-1280, 93d Cong., 2d Sess. 309 (1974).]

The strict prohibition of Section 406(b)(2) has been recently enforced in another context by the Third Circuit in *Cutaiar v. Marshall,* 590 F.2d 523 (3d Cir. 1979). In that case, the Third Circuit specifically recognizes that, while the LMRA establishes certain structural and procedural requirements for benefit plans, ERISA creates "numerous higher standards for the administration of such plans." *Id.* at 530.

In this case, however, the Third Circuit ignored those "higher standards" and held that trustees of trust funds established under Section 302(c)(5) are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA. In reaching this erroneous decision, the two-judge panel relied upon the following dictum from an earlier decision of the same Circuit:

> "The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature. Naturally, the trustees of such a trust fund function are fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. *See Lamb v. Carey,* 162 U.S.App.D.C. 247, [251,] 498 F.2d 789, 793 (1974); *Toensing v. Brown,* 374 F.Supp. 191 (N.D. Cal. 1974), aff'd, 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Labor Law of Welfare and Pension Plans,* 55 Cornell L. Rev. 901, 921 et seq. (1970). The trustees ' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section 302(c)(5). Congress envisioned the conflict of views of employer and employee as a distilling process which would provide safeguards against trust fund corruption." [*Amax Coal Company v. NLRB,* 614 F.2d 872, 881-82 (3d Cir. 1980), quoting *Associated Contractors of Essex County, Inc. v. Laborers' International Union of North America,* 559 F.2d 222, 227-28 (3d Cir. 1977).]

Obviously, this dictum does not support the conclusion that

trustees are collective bargaining representatives. Instead, it is wholly consistent with the cases construing the term "representative" under Section 302(c)(5). Indeed, the Third Circuit cites two of those cases with approval in the very statement upon which the two-judge panel relied.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for certiorari should be granted with respect to the Third Circuit's holding that trustees of trust funds established under Section 302(c)(5) are collective bargaining representatives of the parties who appointed them.

Respectfully submitted,

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No. 80-289

IN THE

Supreme Court of the United States

October Term, 1980

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854
and UNITED MINE WORKERS OF AMERICA,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
and
AMAX COAL COMPANY,
A DIVISION OF AMAX, INC.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents*

QUESTION PRESENTED

Are trustees of a multiemployer pension and welfare trust fund, established under Section 302(c) of the Labor Management Relations Act of 1947, representatives for the purposes of collective bargaining and adjustment of grievances within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act?

*The other parties to this case are the National Labor Relations Board and Amax Coal Company, a Division of Amax, Inc. The Solicitor General on behalf of the National Labor Relations Board also filed a Petition for a Writ of Certiorari, which was granted on January 19, 1981, at National Labor Relations Board v. Amax Coal Company, a Division of Amax, Inc., No. 80-692. The two cases were consolidated for argument. They present the same question. A joint appendix is submitted for both appeals.

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The opinion of the Court of Appeals for the Third Circuit (Pet. Cert., App.A, 1a-32a*) is reported at 614 F.2d 872. The opinion of the National Labor Relations Board (Pet. Cert., App.D, 43a-227a) is reported at 238 N.L.R.B. No. 214.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1980 (Pet. Cert., App.B, 33a-40a). Both a petition for rehearing and a suggestion for rehearing en banc were denied on May 29, 1980 (Pet. Cert., App. C, 41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case directly involves Section 8 of the National Labor Relations Act, 29 U.S.C. §158. This case indirectly involves Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. §186 and certain provisions of the Employee Retirement Income Security Act of 1947, 29 U.S.C. §§1001 *et seq.* These provisions are set forth in Appendix E, pages 227a-255a, of the Petition for Certiorari.

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*References to materials contained in Appendix to the Petitions for Certiorari refer to the Petition filed by the Solicitor General on behalf of the National Labor Relations Board.

STATEMENT OF THE CASE

Respondent Amax Coal Company, a division of Amax, Inc., operates coal mines, primarily bituminous coal mines in the midwestern United States. Amax bargains with petitioner United Mine Workers of America ("the Union") for its midwestern mines as a member of the Bituminous Coal Operators Association ("BCOA"), a nationwide multiemployer group.

In 1972, Amax opened the Belle Ayr Mine in Wyoming, its first sub-bituminous surface mine. Although that mine did not become a member of BCOA, Amax and the Union agreed to a contract regarding the Belle Ayr Mine, which contained many of the same provisions as the BCOA contract. In January, 1975, after the initial Belle Ayr Mine Contract had expired, the Union struck the Belle Ayr Mine, and the Union and Amax began direct negotiations over the terms of a contract for that mine.

By mid-March, 1975, the parties had reached an impasse on several issues, including the Union's proposal that Amax continue to contribute to the Union's existing national pension and welfare trust funds.[1] These funds, which provide comprehensive health and retirement benefits to coal miners and their families, were established through irrevocable trusts pursuant to Sec-

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1. Included in the contract proposals submitted by the Union were the UMWA 1974 Benefit Plan & Trust (Joint Exhibit 14(a)), the UMWA 1974 Pension Plan (Joint Exhibit 14(b)) and the UMWA 1974 Pension Trust (Joint Exhibit 14(c)). The UMWA 1974 Pension Plan and the UMWA 1974 Pension Trust are printed in the consolidated Joint Appendix at 245-270 and 271-282.

tion 302(c) (5) of the Labor Management Relations Act of 1947.[2]

Amax had contributed to these funds with regard to its Belle Ayr employees under the initial Belle Ayr Mine Contract, and the Union insisted to the point of impasse on continuation of that participation. After impasse was reached, Amax on March 17, 1975 offered work to its striking employees upon the terms of its last proposal, including its own employee benefit program. No agreement was subsequently reached by the parties.

Amax then filed unfair labor practice charges, and the General Counsel of the National Labor Relations Board issued a complaint alleging, *inter alia,* that the Union and its Local No. 1854 had violated Section 8(b) (1) (B) and 8(b) (3) of the National Labor Relations Act, 29 U.S.C. §§158(b) (1) (B), (b) (3), in that they "adamantly insisted on the inclusion of Pension and Health and Welfare Trusts Provisions, by the terms of which the trustees of those trusts, who would be collective bargaining representatives, would not be selected by the Employer." (J.A. 8, 15)

The Board unanimously concluded that the Union violated neither Section 8(b) (1) (B) nor 8(b) (3) by bargaining to impasse and striking in support of its proposal that Amax continue to contribute to the Union's existing national pension and welfare trust

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2. These funds had three trustees previously appointed in accordance with Section 302(c) (5) (B) : one appointed by the employers, another appointed by the Union, and a neutral trustee selected by the two trustees. Amax through its membership in BCOA had participated in the selection of the employer-appointed trustee.

funds with regard to the Belle Ayr employees. Noting that proposals concerning employer contributions to employee benefits funds are unquestionably mandatory subjects of bargaining, the Board concluded that the Union's insistence on Amax's participation in an existing trust fund was not unlawful because coerced agreement with respect to a preselected management-appointed trustee of an existing multiemployer trust fund is not coercion with respect to selection of a collective bargaining representative. Affirming in relevant part the decision of the administrative law judge, the Board held that "the trust funds' management trustee is not a collective-bargaining representative within the meaning of Section 8(b)(1)(B) of the Act." (Pet. Cert. App. C, 57a)

The Board explained that the trustees of a jointly administered, multiemployer trust fund instead "are solely fiduciaries, owing undivided loyalty to the beneficiaries of such a plan." (Pet. Cert., App.C, 58a) Since the trustees of a fund established under Section 302(c)(5) of the LMRA are not collective bargaining representatives, the Union's demand that Amax contribute to the existing trust funds did not restrain or coerce Amax in violation of Section 8(b)(1)(B), even though the management trustee of the fund had previously been selected. Accordingly, the Board dismissed the portion of the complaint that alleged violations of Section 8(b)(1)(B) and 8(b)(3) based on the Union's insistence on Amax's continued participation in the pension and welfare funds (Pet. Cert., App.C, 59a).

The Court of Appeals reversed and held that such trustees are collective bargaining representatives covered by Section 8(b)(1)(B) of the NLRA. Relying on its prior decision in *Associated General Contractors of*

Essex County, Inc. v. *Laborers International Union,* 559 F.2d 222, 227-228 (3d Cir. 1977), the Court stated:

> Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the Union in the ongoing collective bargaining process between them.

The Court of Appeals accordingly concluded that the Union had coerced Amax in its selection of a collective bargaining representative and had unlawfully refused to bargain insofar as the Union had insisted on its proposal that Amax continue to contribute to the Union's existing national trust funds whose trustees had previously been selected. The Court therefore ordered the Union to cease and desist from "insisting to the point of impasse that Amax participate in the [Union's] multi-employer pension and welfare funds." (Pet. Cert., App. B, 36a)

In its opinion the Court of Appeals stated:

> Accordingly, we hold that the Union's conduct in insisting to impasse and striking to obtain Amax's participation in the Union's Pension and Trust Fund violates Section 8(b)(1)(B) and 8(b)(3). (Pet. Cert., App.A, 14a)

This "holding" must be read in context with the preceding language of the opinion, since, standing alone, it conflicts with the existing law of mandatory subjects of bargaining expressed in *Inland Steel Co.,* 77 N.L.R.B. 1 (1948), *enforced* 170 F.2d 247 (7th Cir. 1948), *cert. denied* 336 U.S. 960 (1949).

SUMMARY OF ARGUMENT

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." That section is a narrowly focused provision, enacted to preclude union attempts to dictate employers' choice of their representatives in the collective bargaining process. The process of trust fund administration is of a far different order from the duties of collective bargaining agents. The congressional purpose behind Section 8(b)(1)(B) does not extend to fund trustees.

Congress intended that welfare and pension funds established under the provisions of Section 302(c)(5) of the LMRA be real trusts and that their trustees owe a sole and undivided fiduciary duty to the fund's participants and beneficiaries. The courts have given effect to this congressional purpose, refusing to recognize agency relationships between trustees and their appointing parties. The fiduciary responsibilities imposed by Section 302 and ERISA and recognized by the courts cannot be reconciled with the duty of total loyalty to appointing parties imposed under Section 8(b)(1)(B).

The Third Circuit's decision expands the reach of Section 8(b)(1)(B) and places all ERISA trustees in a position of unreconcilable conflict of loyalties. The decision is in error, and should be reversed.

ARGUMENT

I. Congressional Definition Of Restraint Or Coercion In The Selection Of Collective Bargaining Representatives In Section 8(b)(1)(B) Of The LMRA As A Union Unfair Labor Practice Was Not Intended To Include Taft-Hartley Trustees Under Section 302(c)(5) Of That Act.

The proscription of union efforts to dictate the choice of collective bargaining representatives by employers was drawn with a specific narrow focus on the collective bargaining and grievance adjustment process. The statutory scheme of unfair labor practice regulations was not drawn broadly to include management employees or supervisors engaged otherwise than in the bargaining and grievance process.

In *Florida Power & Light Co. v. IBEW Local 641,* 471 U.S. 790 (1974), this Court held that Section 8(b)(1)(B) cannot be so broadly read as to forbid union discipline of supervisors from performing bargaining unit work during a strike, and stated the following:

> Both the language and the legislative history of §8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two separate and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer "in the selection of its representatives for purposes of collective bargaining or the adjustment of grievances," and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers

who would represent them in collective bargaining and grievance adjustment. *Id.* at 803.

In that case the NLRB had extended a line of cases interdicting union discipline of supervisor-members based on the rationale that partisan loyalty required the immunity of supervisory employees from union discipline. Conceding the conflict of loyalties, this Court nevertheless refused to approve the extension of Section 8(b)(1)(B) jurisdiction beyond the area of the clearly focused congressional intent.

In this case the Court of Appeals has extended Section 8(b)(1)(B) to trust administration as an "ongoing collective bargaining process" (Pet. Cert., App.A, 13a, quoting its *dictum* in *Associated Contractors of Essex County, Inc. v. Laborers International Union,* 559 F.2d 222, 227 (3rd Cir. 1977)).

But, as was observed in *Allied Chemical and Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Company,* 404 U.S. 157, 170 (1971), ". . . the union's role in the administration of the [pension] fund is of a far different order from its duties as collective bargaining agent."

The collective bargaining process is recognized as directed to "entering into a collective bargaining agreement," *NLRB v. Insurance Agents International Union,* 361 U.S. 477, 485 (1960). Trust administration is otherwise directed. It involves many different kinds of responsibilities, from eligibility determinations for pension or health benefits through choices of insurance carriers and policies, investments, to costs of administration, and selection of actuaries, accountants and administrators. As to these, for which there are ranges of discretion controlled by Section 302(c) of the LMRA and by the fiduciary provisions of ERISA, it cannot be

said that there are any clearly management or labor "positions" in the sense in which collective bargaining stands are taken.

It is, therefore, erroneous to regard trustees as collective bargaining representatives. Congress never intended to define the bargaining process so widely as to include them. The conflicts in administration which follow from such a holding do nothing to further the bargaining process. A bargaining representative is bound by agency principles of loyalty to the employer or the union he represents.

Section 8(b)(1)(B) was intended to assure that an employer's bargaining representative ". . . be completely loyal to its desires," *Local No. 2150, IBEW,* 192 N.L.R.B. 77, 78 (1971). But the decision of the Court of Appeals in this case speaks in terms which qualify that complete loyalty "insofar as it is consistent with their fiduciary obligations . . ." to the beneficiaries. (Pet. Cert., App.A, 13a) A bargaining representative whose power to act for his principal is subordinated to the interests of fund beneficiaries cannot perform his bargaining functions as Congress envisioned them and as this Court has interpreted them.

A bargaining representative for a union may not interfere with the employer's representative in performing his supervisory functions, including grievance adjustment, in accordance with his principal's instructions. *American Broadcasting Companies v. Writers Guild,* 437 U.S. 411, 436 (1978). If trustees are bargaining representatives, however, as the Court of Appeals decision holds, then a union-appointed trustee who acts to prevent an employer-appointed trustee from breaching his ERISA duties to the fund beneficiaries would

commit an unfair labor practice. Section 8(b)(1)(B) was not intended to create such incongruous results. Congress intends reasonable interpretation of its statutes. The National Labor Relations Board gave Section 8(b)(1)(B) the intended, reasonable interpretation when it dismissed the charges under Sections VI(b) and XVII(j) of the Consolidated Amended Complaint. The Court of Appeals erred in its contrary determination.

II. The Trustees Of The Union's Pension And Welfare Funds Are Fiduciaries Whose Sole Responsibility Is To The Beneficiaries And Participants Of The Funds.

Section 302 of the LMRA, which prohibits payments or loans to employee representatives, labor organizations and their officers and employees, in subsection (c)(5) exempts from the prohibition ". . . payments to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents). . . ." The detailed provisions which follow specify the appointment of trustees by unions and employers with a neutral to break deadlocks. Those provisions are set forth at pages 232a-233a of the Solicitor General's Petition for Certiorari on behalf of the NLRB.

In establishing a form of supervision over welfare and pension funds in Section 302, Congress chose to require the use of a formal trust with fiduciary obligations to the beneficiaries. Senators Ball and Taft, speaking in support of the provisions of Section 302, explained to

their colleagues that it was drawn to make sure that ". . . the employees whose labor builds this fund and who are really entitled to benefits under it shall receive the benefits; *that it is a trust fund . . .*" (93 Cong. Rec. 4750 (1947)) (Remarks of Senator Ball) (Emphasis supplied); ". . . to require that the fund shall be established in definite, detailed form, *in the form of a trust fund . . .*" (93 Cong. Rec. 4747 (1947)) (Remarks of Senator Taft) (Emphasis supplied).

This Court early noted, in *United States v. Ryan,* 350 U.S. 299 (1956), that the United Mine Workers' contract demand for a welfare fund of $.10 for each ton of coal mined had caused the ultimate enactment of Section 302 of the Taft-Hartley Act to assure that such funds would not be used ". . . as individual officers saw fit." *Id.* at 304.

The congressional purpose in adopting Senator Ball's amendment, which became Section 302(c)(5) of the LMRA, was recognized by this Court in *Arroyo v. United States,* 359 U.S. 419 (1959). That choice meant that the Congress set specific standards ". . . to assure that welfare funds would be expended only for the purposes for which they were established." *Id.* at 426.

Decisions in the courts of appeals and the district courts have applied the principles of the law of trusts and the fiduciary responsibility of trustees of Taft-Hartley trusts in a number of cases. In all except the decision in this case by the Court of Appeals for the Third Circuit, the primacy of trust law principles has been recognized and rigorously enforced.

The District of Columbia Circuit has more than once considered the contention that trustees are agents for their appointers and has consistently rejected it.

Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied* 393 U.S. 873 (1968), was an action to compel the trustees of the UMWA 1950 Welfare and Retirement Trust to enroll the plaintiff as a pensioner. On appeal from summary judgment denying his claim, it was asserted on his behalf that the trustees as collective bargaining agents owed him a duty of fair representation under the labor laws, separately from his claim as a trust beneficiary. The Court of Appeals rejected the argument with this statement:

> Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employer or the union. Accord, *United Marine Division I.L.A. v. Essex Transportation Co.,* 216 F.2d 410, 412 (3rd Cir. 1954). *Id.* at 865 n.5. (italics in original)

When the power of the District Court to exercise its ancillary jurisdiction over the administration of the 1950 UMWA Welfare and Retirement Fund came before the Court of Appeals for the District of Columbia in *Lamb v. Carey,* 498 F.2d 789 (D.C. Cir. 1974), *cert. denied sub nom. Carey v. Davis,* 419 U.S. 869 (1974), that court affirmed enforcement of strict fiduciary standards. After observing the unique character of Taft-Hartley Trusts because of the contractual nature of the obligation of employers to make contributions for the benefit their employees, and the concern of Congress that employers and employees be represented in trust administration, the court stated the following:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the Beneficiaries. *Id.* at 793

Most recently, the District of Columbia Court of Appeals, in a decision handed down February 5, 1981, in *Robinson v. United Mine Workers of America Health and Retirement Funds,* No. 78-2047 (D.C. Cir. Feb. 5, 1981), held that Section 302 of the LMRA forbids arbitrary or capricious decisions by those who administer trust funds. Notwithstanding financial and actuarial factors which parties to labor agreements may consider in bargaining revisions in eligibility for benefits, Section 302(c) sets limits on the kinds of rules which may be formulated.

> What is essential is that the eligibility rules themselves not be arbitrary or capricious in content when measured against the governing statute. *Id.* slip opinion at 13

A concurring opinion noted the absence of a reasoned decision by both sides in bargaining about revised eligibility for health benefits. A dissenting opinion observed the difference of financial consideration, including death benefits, of active miners and retirees and their families. A petition for rehearing is pending in the case. Whatever the ultimate outcome may be, the decision stands for the application of trust principles rather than collective bargaining standards to the rights of trust beneficiaries. Collective bargainers, in negotiating changed eligibility standards, are bound to the standard of fiduciary duty to the trust beneficiaries, which is higher than that applicable to good-faith col-

lective bargaining. *Id.*, slip opinion at 13-14, n. 52, concurring opinion, 1, 5.

The Court of Appeals for the Third Circuit, in *United Marine Division, I.L.A. v. Essex Transportation Co.*, 216 F.2d 410 (3rd Cir. 1954) in an opinion by Judge Goodrich, held that Taft-Hartley trustees

> . . . were not . . . representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act are carefully spelled out.—*Id.* at 412

The comments of Senators Taft and Ball in explanation of the provisions which were adopted in Section 302 (c) (5) of the LMRA were quoted in support of that decision.

Subsequently, the same Court of Appeals, in *Mechanical Contractors Association of Philadelphia, Inc. v. Local Union 420*, 265 F.2d 607 (3rd Cir. 1959), once again had before it the provisions of Section 302(c) (5) of the LMRA, this time in connection with contributions to an "Industry Fund" set up with trustees appointed by an association of employers and by the union under an agreement entered into pending a determination of the legality of the purposes set forth in a proposed declaration of trust. Those purposes included, among others, paying the operating costs of the employers' association including public relations, paying the em-

ployers' costs of collective bargaining on an industry-wide basis, and paying for facilities for arbitration and adjustment of grievances.

The court followed its earlier decision in *United Marine Division, I.L.A. v. Essex Transportation Co., supra,* and this Court's decision in *United States v. Ryan, supra,* and held that payments to the joint board, which were concededly not within the scope of the permitted exceptions of Section 302(c)(5) trusts, were unlawful under the provisions of Sections 302(a) and 302(b) of the LMRA. Strict adherence to the terms of Section 302(c)(5) was enforced.

Section 302 was again stringently interpreted and applied by the Third Circuit Court of Appeals in *Nedd v. United Mine Workers,* 556 F.2d 190 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978), where that court determined the availability of a damage action as a remedy for alleged breach of duty to pension beneficiaries, stating:

> Recognition of a derivative cause of action for the recovery of money for the trust is consistent with the overall statutory purpose of §302(c)(5)—the preservation of the trust corpus for its intended beneficiaries.—*Id.* at 204-5

The reasoning of the cases decided by the courts of the District of Columbia and Third Circuit has been followed in opinions of the Court of Appeals for the Ninth Circuit. *Toensing v. Brown,* 528 F.2d 69 (9th Cir. 1975) involved a claim that trustees had failed to exercise an independent judgment in granting larger increases to active employees than to retirees. The district court held that the trustees exercised a proper dis-

cretion, citing, *inter alia, United Marine Division, I.L.A. v. Essex Transportation Company, supra,* as well as this Court's opinion in *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971). The Court of Appeals affirmed the decision, applying the standard of review for trustees' decisions, and observing:

> We wish to emphasize, however, that trustees have a duty to exercise their independent judgment in administering trust funds established under §302 of the Labor Management Relations Act. Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory. Although two of the trustees may have had a misconception about the weight to be accorded to recommendations of the collective bargaining parties, ten of the fourteen trustees voted on the planned increases, and the vote in favor was unanimous. No other evidence suggested that the remaining trustees failed to exercise independent judgment. The action of the trustees must be upheld because it was not arbitrary or capricious.—528 F.2d at 72.

In a case in which it reviewed, modified, and in part reversed a decision and order of the National Labor Relations Board, the Court of Appeals for the Ninth Circuit passed upon the contention that a pension trust was the agent of the union which appointed five of its ten trustees, *NLRB v. Carpenters, Local 1913,* 531 F.2d 424 (9th Cir. 1976). The NLRB had held the pension trust to be the union's agent on the basis of the composition of its board of trustees and the power of the

union to remove any or all of the trustees which it appointed at any time.

The Court of Appeals reversed, holding squarely that the trust was not the union's agent:

> It is generally agreed that both agents and trustees are fiduciaries, but there are significant differences between the two. An agent acts for and on behalf of his principal and subject to his control. A trustee acts for the benefit of the beneficiaries of the trust; he is an agent only if he agrees to hold title for the benefit and *subject to the control of another*. Restatement 2d, Agency §14B; Restatement 2d, Trusts §8. Unless the Union can be said to have control of the operations of the Trust, the Trust should not be treated as the Union's agent. Id. at 426-7 (Italics in original)

The black letter text of the cited section of the Restatement (second) of Trusts is short and direct:

> **§8. Trust and Agency**
>
> **An agency is not a trust.**

This basic distinction echoes the words of Senators Taft and Ball when they spoke on the floor of the Senate explaining their purpose in the provisions of the Ball Amendment, which became Section 302 of the Taft-Hartley Act, and quoted hereinabove above at page 11 of this argument, to make sure that the fund is a *trust fund.*

In *Blankenship v. Boyle,* 329 F. Supp. 1089 (D.D.C. 1971), the District Court for the District of Columbia reviewed the actions of trustees of an earlier UMWA trust. The court enforced strict trust law principles. In

granting mandatory relief against breaches of trust the court observed the purpose of Congress in adopting the trust mechanism as the legal means of protecting the beneficiaries. The Opinion of the court contains the following statement:

> The Congressional scheme was thus [by the requirement of a neutral trustee] designed not to alter, but to reinforce "the most fundamental duty owed by the trustee": the duty of undivided loyalty to the beneficiaries. 2 Scott on Trusts §170 (3d ed. 1967). This is the duty to which defendant trustees in this case must be held.—*Id.* at 1095

A carefully analytical commentary, Welch and Wilson, *Applicability of Traditional Principles of Trust Law to Union and Management Representatives Administering Taft-Hartley Trusts,* 23 Lab. L. J. 671 (1972), contains a clear and comprehensive survey of the subject and the decisions.[3]

Its authors concluded that trust law principles govern the administration of Taft-Hartley trusts, to the exclusion of any agency relationship of trustees to their appointing unions, employers, or employer associations. Their conclusion took into account the legislative history, the practical administration of such trusts, and the

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3. Earlier scholarly commentary on the Taft-Hartley Act was not as clear. Professor Archibald Cox apparently did not perceive that the use of the trust as a means of protecting employee welfare and pension funds would work as effectively as state regulation of mutual savings banks and mutual insurance companies, or that multiemployer trusts were possible under the provisions of Section 302(c)(5) of the LMRA: Cox, *The Labor Management Relations Act,* 61 Harv. L. Rev. 274, 290 (1947), cited in *Arroyo v. United States, supra.*

tendency of then pending legislation having to do with regulation of pension plans toward "greater control, greater fiduciary responsibility, swifter and more complete remedies." *Id.* at 678. The legislation enacted by Congress since that article was written has been consistent with that analysis, as the discussion below of the Employee Retirement Income Security Act of 1974 (ERISA) and the Multiemployer Pension Plan Amendments Act of 1980 will demonstrate.

III. ERISA And The Multiemployer Pension Plan Amendments Act of 1980.

If there were any doubt remaining as to Congressional policy with respect to the character of the trusteeships under Section 302(c)(5) of the LMRA, it must surely be dispelled by the stringent provisions of ERISA defining the fiduciary duties of trustees of employee benefit trusts. That comprehensive regulatory statute and the 1980 Multiemployer Pension Plan Amendments Act carry forward the continuing concern of Congress with the fiduciary nature and financial soundness of the pension funds which have been built up by the labor of millions of American wage and salary workers.

The provisions of ERISA are clear and unambiguous in imposing liability on a fiduciary for breach of duty generally or engaging in specified prohibited transactions: ERISA §§404, 405 and 406, 29 U.S.C. §§1104, 1105 and 1106.

A fiduciary is required to "discharge his duties with respect to a plan *solely* in the interests of the participants and beneficiaries—and (A) for the *exclusive* purpose: of providing benefits to participants and their beneficiaries", ERISA, §404(A)(1), 29 U.S.C. §1104(A)(1) (Emphasis supplied).

Argument.

Fiduciaries are not permitted to act "in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. §1106(b)(2).

If there is room for interpretation of this clear language, judicial decision and legislative history provide it.

Cutaiar v. Marshall, 590 F.2d 523 (3d Cir. 1979), decided by the same court of appeals which construed the same statute in this case in 1980, involved a transaction by which trustees of two multiemployer plans serving many of the same beneficiaries sought to obtain approval from the Secretary of Labor of a loan to one trust, a health and welfare plan which was experiencing cash deficiencies, from the other, a pension trust with assets available to lend. The trustees were the same for both trusts and the plan administrator which served both trusts recommended the transaction.

The pension trustees had deadlocked, three of them questioning the propriety of the loan in light of their fiduciary responsibilities under ERISA. The impartial umpire appointed under Section 302(c)(5) decided that the transaction was not prohibited by ERISA. The loan transaction was consummated.

Later, the Secretary of Labor, following an investigation, wrote to the pension trustees and informed them that they had acted in a transaction involving the plan on behalf of a party (the welfare plan) whose interests were adverse to the interests of the plan, its participants, or beneficiaries, that they might be held personally liable under §409 of ERISA, 29 U.S.C. §1109, and that in future

transactions between the plans, they should seek prior exemptions under §408 of ERISA, 29 U.S.C. §1108.

Because the letter of the Secretary of Labor caused problems with fiduciary liability insurance carriers, the trustees sought a declaratory judgment nullifying the letter and its interpretation of the Act. The District Court granted the relief sought, and the Secretary of Labor appealed.

The Court of Appeals held as follows:

> With this framework, the issues are resolved by a simple exercise in statutory construction. Does §406(b)(2) [of ERISA] prohibit transactions "adverse" in the technical sense asserted by the Secretary, or must a transaction exhibit fiduciary misconduct, reflecting harm to the beneficiaries, before the statute is violated? We endorse without reservation the interpretation of the Secretary. When identical trustees of two employee benefit plans whose participants and beneficiaries are not identical effect a loan between the plans without a §408 exemption, a per se violation of ERISA exists. *Id.* at 529

That court adverted to congressional policy without recourse to committee hearings and reports, quoting the statement of findings and policy from Section 1 of ERISA, 29 U.S.C. §1001. It concluded that Congress intended ERISA fiduciary standards "to apply to plans formerly governed only by the Taft-Hartley Act," *Id.* at 530.

If recourse is had to committee hearings and reports, those secondary aids to statutory construction speak the same language of fiduciary responsibility to

the beneficiaries of the trust, to the exclusion of any other interest. The House Conference Report on ERISA contains explanations in its long discussion of the fiduciary standards sections of the bill as it was ultimately enacted, all of which confirm the continuing intent to require traditional trust law principles as the means of enforcing the rights of beneficiaries and participants as the exclusive allegiance of the trustees.

Under the heading "exclusive benefit for employees" the conferees explained as follows:

> Under the conference substitute *each fiduciary of a plan must act solely in the interests of the plan's participants and beneficiaries and exclusively to provide benefits to these participants and beneficiaries* (or to pay reasonable plan administrative costs). H.R. Conf. Rep. No. 93-1280, 930 Cong. 2d Sess. 5083 (1974) (Emphasis supplied).

Later in the same report they affirmed their intention to employ the principles of trusteeship with court enforcement in the following paragraph:

> *Prohibited Transactions*
>
> *In General.*—The conference substitute prohibits plan fiduciaries and parties-in-interest from engaging in a number of specific transactions. Prohibited transaction rules are included both in the labor and tax provisions of the substitute. Under the labor provisions (title I), the fiduciary is the main focus of the prohibited transaction rules. *This corresponds to the traditional focus of trust law and of civil enforcement of fiduciary responsibilities through the courts.—Id.* at 5087. (Emphasis supplied).

They gave the following clear expression of their intention to prevent conflicting loyalties from frustrating a trustee's performance of his exclusive duty to the plan beneficiaries and participations in a section headed "Additional Prohibitions":

> In addition, the labor provisions . . . prohibit a fiduciary from acting in any transaction involving the plan *on behalf of a person (or representing a party) whose interests are adverse to the interests of the plan or of its participants or beneficiaries. This prevents a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of the plan's participants and beneficiaries.*—*Id.* at 5089. (Emphasis supplied).

Most recently, Congress adopted the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, Sept. 26, 1980, 94 Stat. 1209, in which it made additional findings and declaration of policy to provide, *inter alia,* reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans and a financially self-sufficient program for the guaranty of employee benefits under multiemployer plans. In debates on the floor of the Senate, Senator Randolph asked for confirmation that that amendatory bill was intended to reaffirm the present law,

> . . . that these plan trustees as fiduciaries still have the sole responsibility, as I understand it, to the beneficiaries of the plan? * * * I do not believe that we in the Congress have ever expressed an intent under ERISA or any other Federal law that an agency status should or does exist between trustees and their appointers.

and was answered by the bill's sponsor

> Mr. Williams. I am happy to respond to the Senator from West Virginia that that is the situation and that is correct. In all instances the actions of the trustees must be made with the sole interest of the plan's beneficiaries in mind. That was, that is, that will be.
>
> —126 Cong. Rec. S 10104 (Daily Ed. July 29, 1980)

In the House of Representatives, Representative Thompson spoke directly to the question which is before the court in this case, demonstrating with certainty that the Congress recognized the error of the Court of Appeals decision:

> Although this bill has added important new responsibilities for plan trustees, particularly under the reorganization provisions, this legislation simply reaffirms the present law, that these plan trustees as fiduciaries have sole responsibility to the participants and beneficiaries of the plan. A recent Court of Appeals decision, Amax Coal Company against NLRB which was wrongly decided, apparently suggests that the trustees are collective bargaining agents for the parties who appoint them. That is an erroneous interpretation of both ERISA and federal labor law and does not reflect congressional intent.
>
> —126 Cong. Rec. H 7902 (Daily Ed. Aug. 26, 1980)

What Congress did in its 1980 amendment, while it may not establish what it meant in 1947 and 1974, is nevertheless a relevant consideration, which courts may properly take into account, in determining the effect of earlier legislation, of which the later law is another major step. *NLRB v. Allis-Chalmers Manufacturing Co.,*

388 U.S. 175, 194 (1967); *NLRB v. Drivers Local 639*, 362 U.S. 274, 291-2 (1960).

The congressional policy toward pension and welfare trusts expressed in the 1980 legislative debates conforms to the pattern of federal labor law as it has developed since the adoption of the LMRA in 1947. The administration and enforcement of the statutes relating to labor and employee benefits is a complex field in which Congress has paid careful attention to the responsibilities of different agencies of government. The National Labor Relations Board, the Treasury Department, the Labor Department, and the courts each have important administrative and enforcement powers, duties and responsibilities, the scope of which are determined by Congress.

With respect to pension and welfare plans, Congress made the original choice of the trust as the legal means of assuring that such plans are administered for the sole benefit of the beneficiaries and participants through the application of the principles of trust law and fiduciary duty. Congress chose not to mandate administrative supervision and enforcement of trust administration, as it might have done if it had perceived the trust relationship as an extension of the collective bargaining process.

The National Labor Relations Board, which is charged with enforcement of the federal labor laws, has concluded that Congress did not intend that the Board regulate the exercise of fiduciary duties by fund trustees. *Sheet Metal Workers International Association and Central Florida Sheet Metal Contractors Association, Inc.*, 234 N.L.R.B. 1238 (1978) *pet. for review pending* (5th Cir. No. 79-2396). The Third Circuit's decision

pays no deference to this Board determination, but instead requires the Board to assume concurrent responsibilities over a substantive area already committed to the courts and the Secretary of Labor under the LMRA and ERISA.

Congress did not intend a conflict among agencies committed with enforcing labor and pension laws. In enacting and amending ERISA it spelled out the functions of the Secretary of Labor and the Secretary of the Treasury. Had it intended to confer additional unfair labor practice jurisdiction upon the National Labor Relations Board, it would not have done so *sub silentio* in legislation as closely drawn and thoroughly considered as the LMRA and ERISA and their amendments. But if trust administration is collective bargaining, then the NLRB will have regulatory power over trustees under Sections 8(a)(5), 8(b)(3) and 8(d). Labor laws are not to be interpreted by the NLRB or the courts so as to usurp "major policy decisions properly made in Congress" or to move the NLRB "into a new area of regulation which Congress has not committed to it", *Ford Motor Company v. NLRB,* 441 U.S. 488, 497 (1979).

Moreover, if the Court of Appeals decision is the law, then the obligation of collective bargaining representatives to provide fair representation to members of collective bargaining units, whether union members or not, would open the district courts to actions by pension beneficiaries under §301 of the LMRA, a jurisdiction which the District of Columbia Circuit Court of Appeals denied in *Miniard v. Lewis, supra.* Under §502 of ERISA, 29 U.S.C. §1132, actions by beneficiaries are specifically and fully provided for. Fair representation as a basis of jurisdiction would contribute nothing to the law.

Argument.

If the decision of the Third Circuit Court of Appeals stands, the advantage of multiemployer plans in stability and cost savings will be lost to small individual pension plans. Existing multiemployer welfare and pension plans will exist only so long as independent signatories choose not to withdraw; their withdrawal will be a nonbargainable license to shop for cheaper programs in smaller actuarial groupings, contrary to the policy of Congress, declared in ERISA, and its 1980 Multiemployer Pension Plan Amendments Act, to promote the soundness and stability of plans, 29 U.S.C. §§1001 and 1001(a).

More than 8.8 million employees and pensioners were estimated by the Department of Labor as having interests in multiemployer funds with more than $22,000,000,000 in assets in 1975. Department of Labor, *Pension and Welfare Benefit Programs:* Study of Multi-Employer Plans I-2, I-10, IV-5 (1979). The interests of these beneficiaries and participants will be put in serious jeopardy by the effects of the decision of the Third Circuit Court of Appeals. It should be reversed.

CONCLUSION

The rights of beneficiaries of trusts created in conformity with Congressional specifications are entitled to be treated as the national legislature has consistently described them and as the courts have, until now, respected them—as beneficiaries of trusts, not as third party beneficiaries of the collective bargaining agreements between their employers and unions.

The judgment of the Court of Appeals with respect to Amax's participation in the Union's Multiemployer Pension Welfare Trusts should be reversed.

Respectfully submitted,

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APR 8 1981

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
and UNITED MINE WORKERS OF AMERICA,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
and
AMAX COAL COMPANY, A DIVISION OF AMAX, INC.,
Respondents
and
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether employer and employee representatives on trust funds created in accordance with § 302(c)(5) are collective bargaining representatives within §8(b)(1)(B) and elsewhere in the Act so as to preclude a union from forcing an employer to participate in a multiemployer trust fund with a preselected trustee-representative.

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Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968)	41
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Robinson v. United Mine Workers of America Health and Retirement Funds, ____ F.2d ____, 106 L.R.R.M. 2441 (D.C. Cir. 1981)	17
Romeo Community Schools v. HEW, 438 F.Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979)	43
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Cox, *Some Aspects of the Labor Management Relations Act*, 61 Harv. L.Rev. 274 (1948) 20

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Department of Labor Regulation

29 C.F.R. § 2550.408 b-2(e)(1) 35,36

Kolodrubetz, *Multi-Employer Pension Plans Under Collective Bargaining* - Part III, Bureau of Labor Statistics, Monthly Labor Review, April 1962 21,22

Lambos, *Welfare and Pension Plans: Policing the Trustees: The Law Governing Labor-Management Employee Benefit Funds* in Symposium on Labor Relations Law 611 (R. Slovenko ed. 1961) 10

Legislative History of the Labor Management Relations Act, 1947, Vol. 2 (1948) 19,31

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UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

STATUTORY PROVISIONS INVOLVED

This case involves the National Labor Relations Act, as amended, 29 U.S.C. §§ 152 and 158 (hereinafter referred to as § 2 and § 8 of the Act); the Labor Management Relations Act of 1947, 29 U.S.C. § 185 and 186 (hereinafter referred to as § 301 and § 302 of the Act or LMRA); and the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501 (hereinafter referred to as § 501 of the LMRDA). This case also involves the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1104-1108 (hereinafter referred to as

ERISA §§ 404, 406, 407 and 408). This case also involves the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1209 (hereinafter referred to as the Multiemployer Pension Plan Amendments Act).

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit correctly upheld the National Labor Relations Board's (Board) Petition to enforce its findings that the United Mine Workers of America, Local No. 1854, and United Mine Workers of America (hereinafter the Petitioners or Union) had, among other things, unlawfully struck to force the Employer to participate in multiemployer bargaining in violation of § 8(b)(1)(B). The Board and the Court also found that the Union had committed numerous other refusal-to-bargain conduct in violation of § 8(b)(3) of the Act. These violations included findings that the Union had refused to meet and bargain with the Belle Ayre Mine,[1] owned and operated by Amax Coal Company, a division of Amax, Inc. (hereinafter Employer or Amax); that the Union had unlawfully insisted Amax select as its bargaining representative and be bound by negotiations controlled by a multiemployer association (the Peabody group), whom the Employer believed was unwilling to adequately represent the best interest of the Employer and its Belle Ayre employees; that the Union had insisted upon various contract clauses contained in its other multiemployer association negotiated agreements, which clauses were non-mandatory and/or illegal subjects of bargaining; and that the Union had engaged in an unlawful strike in order to force Amax to accede to the union's demands. Central to and consistent with the Union's unlawful demands and strike to force

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[1] The Belle Ayre Mine commenced mining operations in 1973. (Jt. App. 33) Prior to the time a representative complement of employees were hired at the Belle Ayre mine, the employer agreed to the Union's request for a separate sub-bituminous agreement with the specific understandings that Belle Ayre mine was a separate bargaining unit and that in 1974 Amax would negotiate a separate agreement for the Belle Ayre mine. (Jt. App. 76)

Amax to select as its bargaining representative (and to be bound by a multiemployer association the Employer felt was unwilling or unable to adequately represent it and its Belle Ayre employees interests), were the Union's demands that the Employer also participate in multiemployer trust funds developed and controlled by an entirely different collective bargaining agreement, a different bargaining unit and different employer association (the Bituminous Coal Operators Association also known as the BCOA), which the Employer believed was unable to adequately represent its employees and the Employer's best interest in the Belle Ayre mine bargaining unit. Furthermore, participation in the multiemployer trust funds required the Employer to accept the trustee designated by the BCOA. Amax, for its Belle Ayre mine barganing unit had proposed retirement and health and welfare programs which offered its employees better benefits than those provided by the Union plans. Notwithstanding this, the Union refused to consider these better proposals and adamantly insisted that the Employer be bound by trust agreements under a collective bargaining agreement negotiated by a different bargaining unit, namely the BCOA. Not only was this designed to force Amax to be bound by whatever other associations negotiated in other bargaining units, it deprived Amax of its right to select its own representative in dealing with the impor-

tant terms and conditions of employment relating to pensions and health insurance.[2]

In order to fully appreciate the issues in this case the following factual circumstances are set forth:

1. The Union had a collective bargaining agreement with another bargaining unit, namely the Bituminous Coal Operators Association (BCOA) (hereinafter called the BCOA Agreement or Wage Agreement).

2. Amax, pursuant to a different Board unit certification, was negotiating a separate and different agreement with the Union. All during these negotiations, the Union was bargaining under protest and continued to claim Amax was bound by the Association Agreement.

3. At the same time that Amax Belle Ayre unit was negotiating with the Union, the Union and BCOA were negotiating *new trust agreements,* called the 1974 Benefit Trust and 1974 Pension Trust (hereinafter called the UMW Trusts).

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[2] To appreciate the inequity and injustice to the Employer and its Belle Ayre unit employees averted by Amax's insistence on refusing to participate in the UMW Funds and to be bound by the BCOA Agreements pertaining thereto, it need only be noted that those funds reduce benefits for all of the participants because of the short fall in funding caused by the "wildcat" strikes in the BCOA bargaining unit—something neither the Employer or its Belle Ayre unit employees were responsible for, nor could they have done anything to stop, prevent or remedy. This further illustrates a reason why participation in multiemployer bargaining cannot be compelled and why one bargaining unit should not be compelled to be bound by another's agreement. Otherwise, employees and employers in one unit can suffer substantial disruptions in terms and conditions of employment while at the same time being powerless to avert or remedy the problem or even participate in discussions of solutions. To so deprive the employers and employees of their collective bargaining rights regarding such major benefits is completely contrary to all of the policies of the Act not the least of which is that expressed in § 9(b) that the best way to "assure employees the fullest freedom in exercising rights guaranteed by this Act, . . ." is by letting each unit settle and handle its own labor disputes.

4. The new UMW Trusts were based solely on the provisions of the BCOA Agreement; and the terms of the UMW Trusts were to effectuate the provisions of the BCOA Agreement.

5. The BCOA-appointed trustee and the Union-appointed trustee on the UMW Trusts were unable to act for the sole and exclusive benefit of Amax's Belle Ayre unit employees while at the same time acting solely and exclusively on behalf of the BCOA unit employees because, in many respects, the interests of the employees under the UMW Trusts and the BCOA Agreement were adverse to that of the Employer and its employees. For example, the Union was demanding that Amax contribute substantial sums to the 1950 benefit trusts in which no Belle Ayre employees would ever participate or benefit since no "employees" were involved in the 1950 funds.

6. The UMW Trusts are part of the BCOA Agreement and give the trustees broad authority and powers; to wit, the authority to negotiate and agree on royalty rates and contributions, to select and set criteria for acceptable insurance carriers, to investigate disputed claims, to establish consistency in plan coverage and in the awarding of claims, to adjust and settle disputes arising under the provisions of the Wage Agreement relating to their area of responsibility, to require employers to cease doing business with unacceptable insurance carriers, to interpret, apply and enforce compliance with the terms and objectives of the plans that are included in the contract, to enforce the contract and to settle, adjust and compromise claims arising thereunder, and to determine whether provisions of the BCOA Agreement have been breached and/or are to be enforced and make such changes in the Plans and Trusts as they deem to be necessary or appropriate.

7. During negotiations, Amax proposed its own benefits and pension plans, which provided employees with better benefits, at a lower cost, and proposed reciprocity (i.e., portability) with the Union funds. The Union deferred to

the trustees of the UMW Trusts who rejected Amax's proposal regarding reciprocity and portability.[3]

8. Amax refused to participate in the UMW Trusts without equal representation on the trust funds and further objected to having its Belle Ayre unit employees benefits controlled or undermined by actions of the BCOA and Union representatives on the UMW Trusts whose interests were adverse.

With these cogent facts as a backdrop, Amax submits that the trustees of the UMW Trusts are clearly collective bargaining representatives under § 8(b)(1)(B) of the Act and that Amax could not be compelled, absent its agreement, to participate in the multiemployer trust fund; nor to waive its right to select its own representative for the purpose of administering such important benefits by being forced to agree to an already-designated management trustee.

Since the Employer and Union trustee-representatives engage in collective bargaining and the adjustment of grievances in the course of their duties of carrying out the functions of the trust and collective bargaining agreement, the Union's strike to force Amax to participate in the multiemployer trust fund with the predesignated representatives restrained and coerced Amax in the selection of its representative for collective bargaining purposes.

Employer representatives and employee representatives on joint trust funds do not lose their representational status by virtue of their appointment as trustees. The duties and

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[3] The Petitioners' argument saying that multiemployer § 302(c)(5) trusts are less costly, provide better benefits than single employer trusts or are necessary to ensure portability are totally unsupported by the record in this case. The record demonstrates the single employer plan rejected by the Union was better, was as portable, was more financially secure and less costly than the UMW Trusts.

functions performed as trustees are, in large measure, that of agents for their respective appointing party. This agency relationship has been long recognized and regulated by the Board and courts.

Further, the fiduciary obligations of such employer and employee "representatives" are not inconsistent with their roles as representatives or agents of the appointing parties. While such "representatives" owe a fiduciary duty to the trust beneficiaries ("the employees of such employer, and their families and dependants"), this is only one aspect of their status. The Employer and employee representatives have definite and frequently different views on contributions, distributions, and on other matters concerning the interpretation and application of the Trust and the collective bargaining agreement and the settlement and adjustment of claims and disputes arising thereunder. On these decisions, the fiduciary obligations are not compromised; rather, they are a plateau upon which bargaining-type decisions are made by the trust representatives. This premise was recognized by Congress when it set forth in § 302(c)(5) that there was to be equal representation and if the employer and employee representatives are unable to resolve a dispute and there are "no neutral persons" on the fund empowered to break the deadlock, this statutory scheme required that it be submitted to a "neutral or "impartial umpire" to decide such dispute.

ERISA did not change the previously existing common law duty that all trustees had to act in a prudent manner with respect to the interest of and for the sole and exclusive benefit of the employees of "such employer, and their families and dependents"; nor was it intended to remove the trustee from his representative or agency relationship. To the contrary, ERISA § 408(c)(3) recognizes that a trustee may also be an officer, employee or representative of a

party in interest. In this context, the Congressional intent of both the LMRA and ERISA has been effectuated. The Multiemployer Pension Plan Amendments Act of 1980 has not changed this relationship.

ARGUMENT

I.

TRUSTEES ON § 302(c)(5) TRUST FUNDS ARE REPRESENTATIVES WHO CAN ENGAGE IN COLLECTIVE BARGAINING.

The thrust of the Petitioners' and amicus' position is that the trustees appointed to § 302(c)(5) trust funds cannot be representatives of the parties appointing them because they have a sole, exclusive, and individual fiduciary obligation to the beneficiaries of the funds. In other words, it is the argument of the Petitioners and their amicus that trustees do not and cannot "wear two hats", one hat as a representative of the party appointing them and another hat as a fiduciary. The Petitioners contend that the Court of Appeals' decision recognizing that trustees "wear two hats" is in direct conflict with § 302(c)(5), ERISA and the common law duty of trust fiduciaries.

From the logic syllogism, which requires a major and minor premise, the Petitioners' position fails completely. The question of fiduciary — statutory or common law — does not even aspire to a minor premise; it is a non-issue! The major premise and the threshold question is: Is a trustee a representative who acts in response to or in the interests of the party appointing him? By statutes, by NLRB decisions, and by courts decisions, the answer is an unequivocal *YES*.

Section 302 makes it unlawful for an employer to make payments to employees or representatives of employees except as specifically authorized by law. Subsection (c) contains the exception:

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of *such employer,* and their families and dependents . . . : *Provided,* that . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and *employees and employers* are equally represented in the administration of such fund, *together with such neutral persons* as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the *two groups* shall agree on an *impartial umpire to decide such dispute,* or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement. (Emphasis added)

The term *representatives* as used throughout § 302, has a clear meaning, both in the legislative history and the case decisions.

The language of § 302(c)(5) does not change the reference to or meaning of the term *representatives*. To the contrary, the language emphasizes that the trust fund is "established by *such representatives*", that the employees and employers are equally represented, and in the event of a deadlock among the representatives, an impartial umpire is to be selected by them to resolve the dispute.

Persons selected or appointed to the trust funds are the representatives of the parties appointing them. The Petitioners maintain that the persons being appointed are not representatives, but rather are fiduciaries solely to the trust beneficiaries. It is respectfully submitted that the Petitioners' position is without factual, practical or legal foundation. The totality of the circumstances dictate the capacity of the fund appointee. These circumstances include: (1) the context of negotiations, and (2) the provisions of the trust agreement and the powers and discretion given the trustees.

It has been said that § 302 trusts come in different varieties — some trusts limit the scope and authority of the trustees while others provide the trustees with considerable discretion. *See* C. Lambos, *Welfare and Pension Plans: Policing the Trustee: The Law Governing Labor - Management Employee Benefit Funds* in Symposium on Labor Relations Law 611-47 (R. Slovenko ed. 1961). The welfare and pension trusts in the instant case fall within the latter category.

Although the UMW welfare and pension trust funds were modified through negotiations of the 1974 trust instruments, the trustees still have broad powers and, where the decision-making powers are not given the trustees by the trust instruments, the trustees are required to look to the parties creating the trust (and/or appointing the trustees) to give them the necessary power to make the decisions.

The UMW Trusts reserve to the parties the power to amend, and also provide the trustees with the right to amend. (Jt. App. 98q-r)

In the setting that the UMW Trusts provide for actions of the trustees that are not exclusively for the beneficiaries, which is discussed in detail below, we turn to the totality of the circumstances that provide the answer to whether the trustees of the UMW Trusts are representatives.

A. The Negotiations Between The Union And Amax Demonstrate That The Trustees Are Representatives Who Participate In Collective Bargaining.

The record below established that the Union, among other violations, unlawfully insisted that Amax (1) designate a multiemployer association as its representative, and (2) as held by the Court of Appeals, agree to participate in a § 302(c)(5) fund controlled by another bargaining unit.

Permitting unions to coerce employers into multiemployer benefit funds controlled by representatives of other bargaining units is contrary to the entire statutory scheme of the National Labor Relations Act which mandates bargaining in and for appropriate units. To allow this would transfer a major share of bargaining over a mandatory subject from the bargaining table in one unit to that of the other. This could subordinate the interests of the employees in one unit to that of the other against their will and right to seek their own solutions through collective bargaining and representatives of their own choosing. In addition to subordinating their interest to that of the other unit which may in fact be adverse to the financial interest of the subordinated group, it also deprives the employer of its right to bargain through representatives of its own choosing.

Amax not only refused to be forced to accept a representative not of its choosing (i.e., the multiemployer association), it also refused to be forced to accept participation in the UMW Trusts, which were controlled by representatives of a different bargaining unit, where it

would have no voice, representation or protection against decisions directly and indirectly affecting Amax and its Belle Ayre employees. Instead, Amax sought to negotiate its own collective bargaining agreement and its own employee benefit plans and trust. (Jt. App. 99-123, 175-186, 187-209, 210-222, and 283-297) These plans and trust offered greater benefits to employees than the UMW plans. (Jt. App. 224-239) The Union, however, refused to consider Amax's proposed plans and trust and continued to insist on Amax's acceptance of the UMW Trusts, including the predesignated trustees (even though the Union was negotiating the new trusts with BCOA — the 1974 Benefit Trust and 1974 Pension Trust).

The Petitioners point out that health and welfare and pension plans are mandatory subjects of bargaining and the Union had the right to insist to impasse on its proposals. But that argument misses the mark. While it is hard to understand why the Union would strike for a lesser benefit than offered to its employees—the issue was not and is not whether it was a mandatory subject, but whether Amax had to give up its right to select who its representatives would be; and that is a permissive subject. Further, it is submitted that such insistence is unlawful when it is for a specific trust where the trustees can bind the Employer to collective bargaining agreement changes through trustee collective bargaining actions. To illustrate the trustees collective bargaining authority, the UMW Pension Trust proposal, Article XX, Sec. (d)(2) (Jt. App. 98k-98l), specifically authorizes the trustees to establish various royalty rates for coal (i.e., negotiate and agree). If Amax was part of this plan, Amax would then be required to pay these royalty rates and would have no voice in a change directly affecting a fringe benefit contribution.

Moreover, under the UMW Trusts, the trustees could apply these royalty rates to leased or licensed out lands and Amax could be liable. Further, Amax could be required to apply these royalty rates to coal purchased from non-union

employers. See *Mullins v. Kaiser Steel Corp.*, 105 L.R.R.M. 2579, ____ F.2d ____ (D.C. Cir. 1980), *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), and *Huge v. Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), where the courts held that the defense on the bases of § 8(e) (union signatory clause) and antitrust was not available to employers in a suit by the trustees to enforce the trust agreement. Since Amax was resisting the leasing and licensing out, enabling and other union signatory clauses, these cases reinforce Amax's right to take lawful steps to *properly* raise its defenses to unlawful clauses as required by the courts and not wait for the trustees collection action as well as protecting its interest in resisting the trustees' collective bargaining action of imposing royalties on coal produced by and/or purchased from lessees/licensees or non-union employers.

During negotiations, Amax proposed its own Pension Plan and Trust and sought to insure complete portability to employees, proposed a reciprocity agreement with the Union or if that was unacceptable, a Trust worth one year vesting, much better than the 10-year vesting provided in the UMW Trust plan. The Union, however deferred to the UMW Trust trustees, who rejected Amax's negotiations proposal. (Jt. App. 64-66, 83-84, and 92-96). Thus, the trustees actually engaged in the collective bargaining negotiations. This negotiating role is emphasized by the trust fund's previous grant of reciprocity to other employers who were not parties to the BCOA Agreement. (Jt. App. 93-94).

Therefore, the negotiations, coupled with the language, terms and conditions of the UMW Trusts and the actions by the Union representatives and the trustees, demonstrate that the trustees are representatives engaging in collective bargaining and not solely fiduciaries.

B. The Trust Agreements Permit Trustees Wide Discretion And Action That Are Collective Bargaining In Nature And Scope.

Courts have candidly acknowledged that the relationship

between employer and employee trustees of a multiemployer plan is quasi-adversarial in nature and that the trustees function not only as fiduciaries for the beneficiaries of the plan, but also serve as representatives of the parties who appoint them.

The Court of Appeals for the Third Circuit has recognized that the requirement that trustees act as representatives is central to the Congressional scheme set forth in § 302. In *Associated Contrators of Essex County, Inc. v. Laborers International Union*, 559 F.2d 222 (3d Cir. 1977), the court stated:

> The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature. Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. See *Lamb v. Carey*, 162 U.S.App.D.C. 247, 498 F.2d 789, 793 (1974); *Toensing v. Brown*, 374 F.Supp. 191 (N.D.Cal. 1974), aff'd, 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 Cornell L. Rev. 901, 921 et seq. (1970). The trustees' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section 302(c)(5). Congress envisioned the conflict of view of employer and employee as a distilling process which would provide safeguards against trust fund corruption.

559 F.2d at 227-28.

The powers and discretion of trustees, as well as their relationships with their appointing parties, are discerned from both the collective bargaining agreement and the trust instruments. In the instant case, the various agreements proposed by the Union are set forth in the Joint Appendix. These include:

Joint Exhibit 2 - Article XI - Sickness and Accident Benefits (Jt. App. 97-98d)

Joint Exhibit 2 - Article XX - Health and Retirement Benefits (Jt. App. 98e-98x)

Joint Exhibit 14(b) - United Mine Workers of America 1974 Pension Plan, Effective December 6, 1974 (Jt. App. 241-269)

Joint Exhibit 14(c) - United Mine Workers of America 1974 Pension Trust (Jt. App. 270-282)

The provisions of these proposals demonstrate that the trustees have collective bargaining functions, that they are not exclusively fiduciaries, and that the Union's position was to compel Amax to forego representation by accepting irrevocably the BCOA-appointed trustee (and the BCOA Agreement) as Amax's "employer" trustee.

As set forth above, at the same time the Union was attempting to force Amax to accept a multiemployer association as its collective bargaining representative and to accept the UMW Trusts, the Union and BCOA were negotiating and establishing new trusts for health and retirement benefits. The 1974 Pension Trust was to be interpreted and applied as per the Wage Agreement and, according to Article I(2) of the Trust (Jt. App. 271), an Employer was defined as "an employer who is signatory to the Wage Agreement." (*See also* Jt. App. 245) The contributions were to be paid solely by employers in accordance with Article XX of the Wage Agreement. (Jt. App. 266) These contribution terms require the employer to pay the Trusts on a

cents-per-ton-of-coal basis. (Jt. App. 98g-98m) The coal included both coal produced by the employer or "after production by another operator, [coal] procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made . . . ." (Jt. App. 98i) This means that under the Wage Agreement clauses regarding leased, subleased and licensed lands, *all* employers who procure or acquire coal from a lessee, sublessee, licensee or non-union employer would be required to pay contributions. (*See* subsection 7, Jt. App. 98m) Any employer failing to pay these contributions would be subject to enforcement action by the trustees, whose only obligations are through the Wage Agreement and Trust Agreement. (Jt. App. 98o)

Amax was resisting all of the leasing, subleasing, licensing, and assignation clauses as being illegal union signatory clauses, which resistance was in large part upheld by the Board and Court of Appeals. However, with the Wage Agreement and Trust Agreement provisions, Amax could have been in violation of these Agreements. To be required to accept the BCOA appointed-trustee, Amax was being forced to forego representation while at the same time being required to accept a foreseeably adverse representative.

This same conflict would also persist because Amax refused to pay contributions for the 1950 funds since none of Amax's employees were participants or beneficiaries. (Jt. App. 34, 46, and 94 in paragraph B) Here, again, the clear terms of the trust agreement require such payments. If the trustees were exclusively fiduciaries, they would have to enforce the requirement against Amax. However, the Union assured Amax that it would not have to pay contributions for the 1950 trust. (Jt. App. 94 in Paragraph B) By such action, the Union was binding the trustees to this specific change for Amax only and the trustees would have to forego enforcement, which can only mean that the trustees would be acting as representatives of the appointing parties.

The UMW Trusts set forth many specific duties of the trustees that can only be characterized as collective bargaining. For example, as noted earlier in this brief, the trustees are to establish the royalty rates to be paid by the employers on certain coal (Jt. App. 98k-98l); and the trustees are to determine the insurance carriers and plans, based upon criteria that the trustees determine, with the list of carriers being revised "at the discretion of the Trustees" and upon notice to the employer, the employer must cease doing business with any trustees-disqualified carrier. (Jt. App. 98b-98d) Such authority to choose, select and eliminate insurance carriers and non-conforming plans is clearly an extension of the collective bargaining process, and the trustees' power to investigate, reject and allow claims cannot be distinguished from the collective bargaining process of adjusting grievances. Moreover, the trustees must determine where the plans, trust agreements or the bargaining contract itself have been breached or violated and then pursue all legal remedies. (Jt. App. 275-276) The trustees further determine the eligibility or ineligibility of pension beneficiaries whose right to receive benefits has been challenged. (Jt. App. 98q) Here again, the trustees resolve and adjust "grievances."

The UMW Trusts also provide for amendment of the Trusts, which means the trustees *must* agree. For example, Article XX, Section (d) sets forth in pertinent part:

> At any time *during the term of this Wage Agreement, the Employers [who are signatory to the Wage Agreement] and the Union* may agree upon a reallocation of contributions to be paid. . . .

(Jt. App. 98j) (emphasis added). (The right of amendment is also set forth at Jt. App. 246 and 265.) These reservations of amendment rights reduce the independent capacity of the trustees. The trustees are bound by such amendments, both to the trust instrument as well as *changes in the plans. Robinson v. United Mine Workers of America Health and Retirement Funds*, __ F.2d __, 106 L.R.R.M.

2441 (DC Cir. 1981) Note, however, that Amax would have no participation right because it is not a member of BCOA and is not a signatory to the BCOA Wage Agreement.

The foregoing recitation of the various provisions of the Trusts demonstrate the vast discretion of the trustees. The exercise of this discretion is an extension of the collective bargaining process. This is accentuated by Article XX, Section (h)(5), wherein it states:

> The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

(Jt. App. 98q)

These are illustrations of the collective bargaining authority and wide-ranging discretion entrusted to the trustees. The trustees interpret, apply, administer and "enforce" the provisions of the funds and the provisions of the collective bargaining agreement in no less important, but probably more significant, a role in the administration of the agreement than union "stewards" or company "supervisors"; they are even empowered to set and determine contributions to the Trusts.

It is obvious, then, that the trustees have broad, discretionary authority. The employer-trustee representative status assigned under § 302 is for the specific purpose of making sure that the trust fund representatives properly make decisions which are of major importance to the employer, the coal industry, as well as the beneficiaries represented through their Union. *Blankenship v. Boyle*, 329 F.Supp. 1089, 1095 (D.D.C. 1971). The facts that (1) trustees are bound by changes and decisions of the Union and BCOA and (2) the Union and BCOA are bound by changes and decisions by the trustees clearly demonstrate that the trustees are collective bargaining representatives and are not solely fiduciaries, as alleged by the Petitioners.

C. Section 302(c)(5) Required Equal Representation And Requires Appointment By The Respective Appointing Party.

By enacting § 302, Congress intended to prohibit payments by employers to employees, employee organizations and officers or representatives of such organizations except under specified conditions. Congress also intended that the establishment and administration of union funds providing health and welfare and pension benefits for employees be closely regulated. Congress removed the union funds from the exclusive control of unions by requiring employers to be equally represented in and responsible for the administration of the funds.

The legislative history of § 302 confirms the intent of Congress that employers have a coordinate responsibility to the funds. As Senator Taft stated:

> This amendment [Section 302] provides that the employees and employers must be equally represented in the administration of the fund, together with such neutral persons as they may agree upon. In the event of a deadlock the agreement shall be submitted to an impartial umpire.
>
> The purpose is to prevent the abuse of welfare funds.

2 Legislative History of the Labor Management Relations Act, 1947, at 1312 (1948) *citing* 93 Cong. Rec. 4875, 4877 (1947). Senator Morse, an opponent of the amendment, stated:

> Employees and employers must be equally represented in the administration of the fund, and in the event of disagreement between them, machinery is provided for the settling of such disputes. In other words, it requires employer participation in the funds and in the administration of the funds.

2 Legislative History, *supra*, at 1317-18 *citing* 93 Cong. Rec. 4881.

The representation intended by Congress in enacting § 302(c)(5) was to provide oversight of the funds by employer representatives in order to prevent the misuse or abuse that might occur if the funds were left exclusively to the union control. *See Arroyo v. United States*, 359 U.S. 419, 426 (1959). See also Cox, *Some Aspects of the Labor Management Relations Act*, 61 Harv.L. Rev. 274, 314 (1948), where Professor Cox refers to the employer's representative as a "watchdog" of the funds.

In *United States v. Ryan*, 350 U.S. 299 (1956), the Court construed § 302 and stated that the term "representatives" must be construed liberally to give meaning to its context in labor-management relations. This meaning is applicable as well as in the instant case. A trustee is a representative of the party appointing him. And under § 302(c)(5)(B), it requires equal representation.

The responsibility (or the corollary right) mandated by § 302(c)(5)(B), for Amax to oversee the administration of a jointly-administered trust which Amax was being forced to accept, would not have been met by designating irrevocably the BCOA-appointed trustee as Amax's trustee. This takes on greater significance because only signatories to the Wage Agreement have a voice and Amax was negotiating a collective bargaining agreement with major differences in terms and provisions from the Wage Agreement. To allow the Union, in any degree, to force the BCOA-appointed trustee to be Amax's trustee is unlawful under § 302. *Blassie v. Kroger Co.*, 345 F.2d 58, 72 (8th Cir. 1965).

Congress' intent in § 302(c)(5) is not fulfilled if Amax, under different terms and provisions, is deprived of its opportunity to "choose" to give up its right to select its representative in the funds. As Justice (then Judge) Blackmun set forth in *Blassie*, 345 F.2d at 72:

> The whole contemplation of [Section 302] is that the employers who are entitled to representation in the administration of the fund are those who make their contributions because of their subjectability to collective bargaining with the union as a union. If others not in this category choose to contribute, they take their representation as they find it. Further, to permit the union in any degree to participate in the choice of employer representatives does violence to the statutory standard of equal representation.

In addition, in order to fulfill the equal representation requirement of § 302(c)(5)(B), there must be relatively equal rights of appointment and recall of the union and employer trustees.

To permit the Union to literally select, or in the words of the U.S. District Court in the case of *Mobile Mechanical Contractors Ass'n v. Carlough*, 456 F.Supp. 310, 326 (S.D. Ala. 1978), "by choosing the choosers of the trustees", the Union participates to an impermissible degree in the selection of Amax's trustee and violates § 302.

D. The Dual Role Of Trustees, As Representatives And As Fiduciaries, Has Been Recognized By The Courts And Board.

Despite the arguments of the Petitioners that the Court of Appeals' decision on the trustee issue erroneously expands the capacity of trustees to bargaining representative status, the Board and courts have regularly held that trustees can, and do, act as bargaining representatives. *Whelan v. Colgan*, 602 F.2d 1060 (2d Cir. 1979); *Ader v. Hughes*, 570 F.2d 303 (10th Cir. 1978); *Souza v. Teamsters Pension Trust*, 460 F.Supp. 843 (N.D. Cal. 1978); *Culinary Workers & Bartenders Union No. 596 Health & Welfare Trust v. Gateway Cafe, Inc.*, 588 P.2d 1334 (Wash. 1979). As noted by Walter Kolodrubetz in *Multi-Employer Pension Plans Under Collective Bargaining* - Part III, Bureau of Labor Statistics, Monthly Labor Review, April 1962, at 390:

> Multi-employer plans make room for flexibility. In a sense, the joint boards engage in continuous collective bargaining on what the pension plan can and will do. The judgment of the joint boards can be exercised in virtually all matters except the rate of employer contribution. Thus, they generally have the authority to modify eligibility requirements and the benefit structure, even for workers who have retired.[4]

For many years, the Board has held that certain § 302(c)(5) trustees and trust funds have violated § 8 of the Act by acting as agents of the parties appointing them. *See, e.g., Jacobs Transfer, Inc.*, 227 N.L.R.B. 1231 (1977) (trusts, in refusing to accept contributions, are agents of union and employer); *L & M Carpet Contractors, Inc.*, 218 N.L.R.B. 802 (1975) (trustees are agents of each party to collective bargaining agreement); *Fixtures Unlimited*, 213 N.L.R.B. 363 (1974) (union trustees are "agents" of respondent); *Turner-Brooks, Inc.*, 161 N.L.R.B. 229 (1966) (union refused to bargain through its agent, § 302 trustee); *Jones and Jones, Inc.*, 172 N.L.R.B. 2248 (1968) (trust representatives found to be § 8(b)(1)(B) representatives).

As recently as January 8, 1981, the Board found in *Warehousemen's Union Local 334, Teamsters v. The Crescent*, 253 N.L.R.B. No. 109 (Chairman Fanning dissenting), that the trustees of a § 302(c)(5) fund had acted as union representatives when they exercised their discretion under the Trust Agreement to create a vision care plan. The Board majority held that by creating the plan, the trustees, as union agents (and vice versa), had made a unilateral change in a mandatory bargaining subject, which constituted a refusal-to-bargain violation. At page 8 and note 1 of the Slip Opinion, the Board majority stated:

> If such unilateral changes can be made after specific rejection in collective bargaining, then bargaining is

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[4] In the instant case, under the UMW Trusts, the trustees have the power and authority to change or establish the rates of employer contributions.

undermined. Taken to its logical conclusion, even agreed-upon benefits have no certainty of constancy during the contract term if such benefits can be modified by means of the ploy used here. We find no sanctuary for Respondent in the Trust as our colleague does. The inference is clear, and we draw it, that Respondent's representatives were speaking with a union voice while simultaneously seeking to cloak themselves with the immunity of their fiduciary status when they engaged in conduct intended to promote union, not Trust, goals.[1]

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[1] The Board has, of course, found on numerous occasions that trustees of a Taft-Hartley trust have performed certain acts as agents for either or both of their joint settlors. See, e.g., *Jacobs Transfer, Inc.*, 227 NLRB 1231 (1977); *Local 80, Sheet Metal Workers International Association, AFL—CIO, and its Agents, etc. (Turner-Brooks, Inc.)*, 161 NLRB 229 (1966); *J. J. Hagerty, Inc.*, 139 NLRB 633 (1962). Neither the cited cases nor our agency analysis herein contravenes Board law that trustees do not exercise the specialized agency powers of a "collective-bargaining representative." See *Sheet Metal Workers' International Asociation and Edward J. Carlough, President (Central Florida Sheet Metal Contractors Association, Inc.)*, 234 NLRB 1238 (1978). The issue in this case is not whether the Trustees have engaged in collective bargaining *inter se*. The issue is whether the trustees' vision care plan is consistent with the terms and conditions of employment already negotiated by the recognized collective-bargaining representatives of Respondent and the Employers. If inconsistent, then a further issue, resolved through an agency analysis, concerns to whom the change brought by the Trustees may be attributed. As indicated, we would find that Respondent is responsible for the change. We note in this regard that our dissenting colleague joined in a similar finding in *Turner-Brooks, supra*, wherein the Board unanimously found a respondent union responsible for an 8(b)(3) violation committed by its agents who were trustees in the act of administering benefit trust funds.

While the Board majority's disclaimer tries by rhetoric to say they are not doing what they are doing, their actions speak so loudly it is impossible to hear. This is highlighted by Chairman Fannings's dissenting comments:

> Absent any evidence that this action of the employer Trustees was controlled in any way by the union Trustees or by Respondent, I find that implementation of the vision care plan is attributable solely to the proper exercise of independent judgment by the Trustees as a group.
>
> Nor is there any basis for concluding that the vision care plan was an impermissible subject under the terms of the Trust. To the contrary, the Trust Agreement's statement of purpose includes "providing and maintaining any employee benefit, except pension, including but not by way of limitation, life and accident, health and welfare benefits, including dental, *vision*, drugs and pharmaceutical supplies ....." (emphasis supplied.) The section entitled "Purpose of Trust" adds that "The Trustees shall, in their sole discretion, determine which benefits shall be provided." It thus appears clear that implementation of a vision care plan is within the contemplated purposes of the Trust. Especially in light of the acceptances of trust, the Charging Parties are therefore bound by the Trustees' decision to effectuate such a plan . . .
>
> Against this background, I perceive no basis for concluding that Respondent, simply because of its Trustees' interest in and urging of the vision care plan, acted unilaterally regarding effectuation of the vision care benefit, a benefit that entailed no additional employer expenditure during the existing contract, and was subject to revocation by individual employers at the next round of contract negotiations. Accordingly, I would dismiss the complaint.

Slip Op. at 18-19 (footnotes omitted).

Whether prominence is given the Board's majority or its dissent, the conclusion is clear. In finding that the trusts and/or trustees have violated the Act through conduct occurring during the internal administration of the trust, the Board has continued to recognize that the trustee-representatives and such trusts are an extension of and part of the collective bargaining process and is within the pur-

view of § 8 of the Act and that it has jurisdiction over employee benefit trust administration. Such jurisdiction is totally unaffected by the Court of Appeals' holding in the instant case.

The Courts, in recognizing that trustees "wear two hats", have most often separated actions of trustees which involve "structural matters" and those pertaining to "administrative or fiduciary matters." This differentiation is based upon actions instituted under § 302(e). The courts were faced with claims by beneficiaries seeking redress for alleged trustee breaches of fiduciary duties. The courts analyzed § 301(a) and § 302(c)(5) and (e) and the statutory basis for its jurisdiction. The development of the structural matter and fiduciary matter concepts, and the court decisions thereon, are traced in *Alvares v. Erickson*, 514 F.2d 156 (9th Cir. 1975). The court summarized this separation by stating:

> Raymond v. Hoffman, a case much like the one at bar, found § 302(e) jurisdiction without distinguishing the types of cases that might be cognizable under that section. However, based on language in *Bowers, supra*, the more recent of these cases, *Lugo, Insley, Porter*, and *Giordani*, have recognized a distinction between actions involving "structural" deficiencies in the relevant trust which cause it to violate the "sole and exclusive benefit" provision of § 302(c)(5) and actions involving only questions of day-to-day fiduciary administration of welfare and pension funds. Section 302(e), these cases say, provides jurisdiction over the former but not the latter.
>
> Accepting this distinction for the moment, we conclude that the claim of the plaintiffs in this case involves a "structural" rather than an "administrative" matter.

514 F.2d at 165.

The distinction made is that the trustees in a § 302(c)(5) trust have duties that are not exclusively fiduciary in nature. When the trustees make decisions or seek to make changes, such action is not an action of day-to-day fiduciary administration. Generally, according to the cases, this involves structural matters and of necessity involves the representative capacity of the trustees.

In *Ader v. Hughes*, 570 F.2d 303 (10th Cir. 1978), the union-appointed trustees proposed two amendments to the trust agreement. The employer-appointed trustees opposed them. As a result an "impasse" was reached. 570 F.2d at 306. The district court's appointment of an umpire was appealed by the employer-trustees and reversed by the court of appeals. In doing so the court stated:

> The distinction between ordinary and extraordinary matters made in *Bath v. Pixler, supra*, and by appellees in the trust agreement before us, is, we believe, valid. We need not attempt to draw the line, but simply recognize that one exists. The danger in allowing an umpire to determine the legal effect of a particular provision in a trust agreement is that the balance of rights and duties struck by union and employer representatives may very likely be upset by mistake contrary to the original understanding of the parties. The union trustees hope to upset the balance here, and there is nothing subtle about their attempt. They would rewrite the agreement over the united protests of the employer trustees. Thus, this is not a matter for an umpire. Whatever else may be meant by trust fund "administration," the term does not include decisions to amend or not amend a 302(c)(5) trust agreement.
>
> * * *
>
> Section 302 of the LMRA was meant to curb 'the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.' *Arroyo v. United States*, 359 U.S. 419, 426, 79 S.Ct. 864, 868, 3 L.Ed.2d 915 (1959). The statute requires a strong employer presence on the board of trustees. The employer trustees have charged that

> the amendments proposed by the union trustees would favor the unions at the expense of management. Whether the charge is true or not, it certainly is worthy of careful consideration. 'The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature.' *Association Contractors v. Laborers, supra,* at pp. 227-228. A success for the union trustees here would be a defeat for the legislative policy. We do not believe that Congress intended to see provisions born of agreement between management and labor replaced by possibly one-sided amendments that set one faction against the other. When proposals are made to change the instrument which has outlined where the parties shall stand in relation to each other, an impartial umpire is not a substitute for the veto of vigilant employer representatives.

570 F.2d at 307, 308.

The continued recognition of the dual role which trustees play is illustrated by the *Gateway Cafe* case (and cases cited therein). In this case the trustees negotiated a settlement agreement with the employer which required the employer to recognize the union as the bargaining representative. In finding that the trustees action was on behalf of the union, the court pointed out that it was not a breach of the fiduciary obligations; nor did § 302(c)(5) prohibit trustees from serving two principals.

> Where the purpose and effects of a transaction are to benefit the union and penalize employees, the transaction is not solely for the employees' benefit, and it is violative of the statutory prohibition. See Insley v. Joyce, 330 F.Supp. 1228, 1234 (N.D. Ill. 1971). Thus, though trustees are held to high standards under the LMRA, in the absence of a substantial showing that trustees have either paid money to employers or have seriously neglected or subverted the interests of trust

beneficiaries, courts should not trivially set aside their actions. Toensing v. Brown, 374 F.Supp. 191, 198 (N.D. Cal. 1974), aff'd, 528 F.2d 69, (9th Cir. 1975); Lee v. Nesbitt, 453 F.2d 1309, 1311 (9th Cir. 1972).

The settlement agreement in the instant case resolved an existing employer trust fund dispute, avoided possible employer insolvency, and resulted in the continuation of the trust *for the employees' benefit.* Ultimately, the agreement requiring continued contributions to the trust could conceivably further the actuarial soundness of the trust fund. We do not believe an incidental advantage to the union, assuming such an advantage materializes, would be sufficient to defeat this benefit and make the required substantial showing of trustee misconduct. *See Lugo v. Employees Retirement Fund of Illumination Prods. Indus., supra.*

* * *

Further, we observe that had Congress wished the total independence of trustees for which appellants contend, it easily could have acted to prohibit a person from serving both as a union representative and as a trustee. But it did not do so. Rather, Congress required both employee and employer representatives to participate in administration of the trust fund. 29 U.S.C. § 186(c)(5)(B). Thus, some degree of collateral interest on the part of the respective trustees was not totally ruled out.

In this case, while respondent, acting on behalf of the trust, had some degree of collateral union interest, the facts do not demonstrate respondent acted impermissibly in administration of the trust. The terms of the agreement and its effects, do not operate in any way to penalize beneficiaries of the trust. Accordingly, we reject appellants' argument that respondent violated the fuduciary duties imposed by section 186(c)(5).

558 P.2d at 1339-40.

Whether the actions of the trustees are called "structural" or "collateral interest" or "quasi-adversarial", it means only one thing: *Trustees wear two hats—one as a collective bargaining representative and one as a fiduciary.* There is nothing wrong with this dual role. Congress recognized it and the Board and courts have given credence to it. Petitioners, in defense of their positions, ask this Court to disregard and discard the long line of Board and court decisions giving effect to the "two hats" role of trustees. We believe that this Court will not ignore the developed body of case law.

E. Section 501 Demonstrates That Congress Recognized That Collective Bargaining Representatives Can Be Both Representatives And Fiduciaries.

Section 501 of LMRDA, entitled "Fiduciary Responsibility of Officers of Labor Organizations", defines in broad terms the obligations of union officials. In particular, § 501(a) sets forth that "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." It is, therefore, the duty of the officers and representatives "to hold [the union's] money and property *solely* for the benefit of the organization and its members." (Emphasis added).

Thus, a fiduciary relationship is created by § 501, requiring union agents to act in the interests of the union and its membership. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); *Boswell v. IBEW, Local Union No. 164*, ___ F.Supp. ___ (D.N.J., filed January 6, 1981), BNA Daily Labor Report No. 30 (February 13, 1981). Yet those agents are clearly recognized and awarded status as "representatives" of all employees in an appropriate unit for purposes

of collective bargaining. Analogous to fiduciary duties is the duty of "fair representation" imposed on union representatives because they engage in collective bargaining and the adjustment of grievances.

Contrary to the arguments constructed by the Petitioners, § 501 demonstrates further Congressional awareness and support for the proposition that a fiduciary obligation does *not* preclude, and may complement, representative status.

II.

TRUSTEES ON § 302(c)(5) TRUST FUNDS ARE COLLECTIVE BARGAINING REPRESENTATIVES UNDER § 8(b)(1)(B) OF THE ACT.

Section 8(b)(1)(B) was finalized by Congress before § 302(c)(5)(B) was conceived.[5] Realistically, therefore, § 302(c)(5)(B) could not have been within contemplation of Congress when it debated § 8(b)(1)(B). However, the specific legislative premise for § 8(b)(1)(B) is also realistically applicable to § 302(c)(5)(B).

Section 302(c)(5)(B) was passed for the purpose, among others, of precluding the possible abuse by Union officers of the power they might achieve if welfare funds were left to their sole control. *Arroyo v. United States*, 359 U.S. 419 (1959). Senator Taft made reference to the Mine Workers Union "war chest" that could be used against employers. Congress sought to make sure that misuse or abuse of the monies or power it brought would not occur. Professor Cox referred to the employer's representative as a "watchdog" of the funds. As a result, Congress provided for the employer-appointment of representatives on trust funds. If a

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[5] Proviso (B) of § 302 was added as an amendment adopted by the Senate, 93 Cong. Rec. 4754, and accepted by the Conference Committee during the first session of the 80th Congress. Section 8(b)(1)(B) had been part of the bill passed by the 79th Congress but vetoed by the President.

union can dictate who the employer appoints as his representative, then the purpose of § 302(c)(5)(B) is subverted. This is the same premise for the enactment of § 8(b)(1)(B). Senator Taft explained:

> Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes.

2 Legislative History, *supra*, at 1012 *citing* 93 Cong. Rec. 3953-54.

The result is the same in the case of a union attempting to force an employer to accept a representative on a trust fund, which Congress mandated should have *equal representation*. There is certainly no equality if the union can mandate that the employer accept a representative not of his choice. To give the same cognizance to the appointment of a representative required by statute must be firmly within the contemplated parameters of § 8(b)(1)(B) and Congress.

In addition, the facts of this case fully support the conclusion that the UMW Trust trustees are engaged in collective bargaining and the adjustment of grievances. As set forth in the Summary of Argument and discussed in greater detail above, the trustees make collective bargaining decisions by setting contribution rates, forcing employers to do business (or not do business) with only their approved insurance carriers, enforcing terms and provisions of both the trust agreement and the collective bargaining agreement and having the authority to make changes in the plans and trusts as they deem necessary or appropriate. During the negotiations between Amax and the Union the

trustees actually made a negotiating decision on behalf of the Union. They are, therefore, engaging in collective bargaining activities clearly within the terms of § 8(b)(1)(B).

Congress sought to preclude a union from forcing an employer into a multiemployer association. In the instant case, this is exactly what the Union was trying to do with Amax. As part of this multiemployer scheme, the Union also insisted that Amax accept the BCOA-Union benefits and pension plans and trusts. Even after it finally began to bargain with Amax, they insisted upon clauses, terms, and provisions of the BCOA Agreement, which were held to be non-mandatory and/or illegal subjects for bargaining. These actions of the Union can only be interpreted as an attempt to fulfill its initial illegal position—to force Amax into an association. Such coercive action is readily cognizable within the proscription of § 8(b)(1)(B) and is not a legislative enlargement of it. The instant case is *not* in disharmony with *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974), but rather falls within its scope.

III.

NEITHER FEDERAL PENSION PLAN LAWS NOR COMMON LAW PROHIBITS TRUSTEES ON § 302(c)(5) TRUST FUNDS FROM BEING COLLECTIVE BARGAINING REPRESENTATIVES.

Petitioners argue that the trustees of the UMW Trusts are fiduciaries whose sole responsibility is to the beneficiaries and participants of the funds, precluding the fiduciaries from being collective bargaining representatives. In making this argument, Petitioners rely on various court decisions in cases which deal with factual situations involving fund administration, the statutory language in ERISA and fallacious policy arguments advanced regarding the congressional intent in passage of the Multiemployer Pension Plan Admendments Act of 1980. The fiduciary duties contained in ERISA and the common law do not preclude the fiduciary from acting in other capacities and Petition-

ers' concerns regarding the destruction of multiemployer funds, if this case is decided against them, is without foundation.

A. ERISA Does Not Prevent Trustees From Being Collective Bargaining Representatives.

Both Petitioners rely heavily on the statutory framework of ERISA for their proposition that a trustee of a § 302(c)(5) trust cannot be both a fiduciary and a collective bargaining representative. In doing so, Petitioners contend that ERISA requires fiduciaries to administer the plan "*solely* in the interest of the participants and beneficiaries." 29 U.S.C. § 1104. However, there is *no* language in § 404 of ERISA which would prohibit the fiduciary from also being a collective bargaining representative. For that proposition Petitioners have argued that § 406(b)(2) of ERISA, which prohibits "adverse representation", would preclude such a finding. Nonsense!

An analysis of § 406 of ERISA shows that there are four types of prohibited transaction provisions: (1) specific transaction prohibitions, (2) general transaction prohibitions, (3) employer property prohibitions, and (4) fiduciary prohibitions.

Focusing on the non-fiduciary prohibitions, each of these contain in its statutory language an absolute direction not to use plan assets either in a contractual situation with a party-in-interest or to use them in a manner which would either impair those assets' value to the plan or benefit a party-in-interest. The statutory language of § 406(a) of ERISA speaks in terms of plan property being sold, exchanged, leased, or loaned to a party-in-interest, regardless of whether or not value was received. There are in addition, prohibitions, unless qualified under § 407 of ERISA, against

the fiduciary causing the plan to hold either employer securities or real estate. None of these prohibited transactions contained in § 406(a) of ERISA would prevent the fiduciary from also serving as a collective bargaining representative.

Section 406(b) of ERISA contains the fiduciary prohibitions and is the statute Petitioners rely on for the proposition that a fiduciary may not "wear two hats". Specifically, Petitioners argue that § 406(b)(2) of ERISA, which provides that "a fiduciary shall not in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan," prevents the fiduciary from being a collective bargaining representative presumably because the nature of his representation would always be adverse. This view is *not* a correct statutory interpretation.

First, both Petitioners failed to direct this Court's attention to ERISA § 408(c)(3) which provides that "*nothing* in § 406 shall be construed to prohibit any fiduciary from ... serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party-in-interest." (Emphasis added) There is no Congressional intent evidencing what our legislators were contemplating when this provision was enacted or how they intended it to interface with § 406 of ERISA. However, it may have been that Congress did not feel compelled to discuss wording whose ordinary meaning is clear. "Nothing" means precisely that.

Second, the adverse representation provision of § 406(b) operates to prohibit a fiduciary from acting only in those situations involving transactions. Although the meaning of "transaction" is broad, guidance as to its use in § 406(b) can be garnered by examples of transactions contained in § 406(a). In that section, "transaction" refers to sales, exchanges, leasing, transfer of services, goods or facilities or more simply stated, as commercial arrangements. Applying the doctrine of ejusdem generis, the general term "transac-

tion" in § 406(b) should include and cover only those transactions of the same general nature as found in the specific terms in § 406(a). Therefore, § 406(b) only operates when a commercial arrangement is involved. This interpretation is consistent with Petitioners' cited congressional intent of preventing fiduciaries from being put in a position of divided loyalties because the opposite sides of any commerical transaction are by necessity adverse.

The Department of Labor has taken the position that service in dual capacities, without more, does not result in a prohibited transaction under § 406(b) in Advisory Opinion Letter 76-15. This Opinion involved a fiduciary of a plan who was a member of a committee which had the authority to appoint an investment manager. That fiduciary was also on the board of directors of the company which was chosen as the investment manager. The Labor Department stated that a fiduciary is not subject to § 406 of ERISA merely because he continues to serve as a director of the company appointed as investment manager, warning that an adverse representation situation may arise depending on the facts and circumstances. The Department of Labor has ruled similarly in Advisory Opinion Letters 76-62 and 77-47. The Board (NLRB Br. at 30-31, n. 20) would have this court believe that § 408(c)(3) only clarifies § 406. If so, what has been clarified? Amax respectfully submits that the clarity exists in the fact that the fiduciary may be a collective bargaining representative of either the union or the employer.

The Department of Labor regulation, 29 C.F.R. § 2550.408b-2(e)(1), provides:

> If the furnishing of office space or a service involves an act described in § 406(b) of the Act (relating to acts involving conflicts of interest by fiduciaries), such an act constitutes a separate transaction which is not exempt under § 408(b)(2) of the Act. The prohibitions of § 406(b) supplement the other prohibitions of § 406(a) of the Act by imposing on parties in interest who are fiduciaries a duty of undivided loyalty to the plans for which they act. These prohibitions are im-

> posed upon fiduciaries to deter them from exercising the authority, control, or responsibility which makes such persons fiduciaries when they have interests which may conflict with the interests of the plans for which they act. In such cases, the fiduciaries have interests in the transactions which may affect the exercise of their best judgment as fiduciaries. *Thus, a fiduciary may not use the authority, control, or responsibility which makes such person a fiduciary to cause* a plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service. Nor may a fiduciary use such authority, control, or responsibility to cause a plan to enter into a transaction involving plan assets whereby such fiduciary (or a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) will receive consideration from a third party in connection with such transaction. A person in which a fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary includes, for example, a person who is a party in interest by reason of a relationship to such fiduciary described in § 3(14)(E), (F), (G), (H), or (I). (Emphasis added).

The regulation indicates that fiduciaries may find that they could, if they act, be committing a breach of a fiduciary prohibited transaction. The solution recommended by this regulation is simply for the fiduciary not to exercise his authority. At least by negative implication, the Department of Labor has recognized that the fiduciary may have dual capacities and that when a conflict arises such fiduciary may not "act" if his only loyalty is not to the plan. There are no implications that a person cannot be or continue to function as a fiduciary in other circumstances. Even if both

the union and employers seek totally independent fiduciaries, conflicts will still arise in the course of fund administration.

Both Petitioners give little or no recognition to the case, *Curren v. Freitag*, 432 F.Supp. 668 (S.D. I11. 1977), the holding of which is directly on point. In *Curren*, a trustee of a § 302(c)(5) trust was also the Director of Labor Relations for a signatory employer association. Curren actively represented certain member employers of the association in resisting trust audit and collection efforts because such efforts were merely brought to apply pressure during pending labor negotiations. The issue before the court was whether the advice rendered by Curren as the Director of Labor Relations constituted acting on behalf of or representing an adverse party within the meaning of § 406(b)(2) of ERISA. In holding that Curren had not breached his fiduciary duty by giving advice to an adverse party the court stated:

> To effect the broad reading of § 1106(b)(2) sought here by counterplaintiff would require a fiduciary who also serves as an employee of a party in interest as permitted by § 1108(c)(3) to neither inform nor counsel his employer of his opinion of the propriety of actions taken by the fund. In short, such person would require a bifurcated personality. As a fiduciary, the actions of his co-fiduciaries must be known and acted upon but he would be required to remain silent and inactive in his capacity as an employee of a party in interest.
>
> This construction appears to me to be unreasonable and unworkable especially in light of the provisions of the Labor Management Relations Act pursuant to which this particular fund was established which requires employees and employers to be equally represented in administering the Fund. 29 U.S.C. § 186(c)(5)(B).

> A preferable construction, it seems, would prevent the fiduciary from being placed in a position where he was dealing with the Fund on behalf of his employer in a matter concerning the assets of the Fund. "Dealing" in this context should mean that the fiduciary is possessed with the power to compromise the positions of his employer, or the Fund or both. For example, the act should prohibit a fiduciary who was appointed by the contractors' association from being placed in a position which would authorize him to accept on behalf of the Fund, an amount less than the amount due the Fund in settlement of a Fund claim against an individual contractor. On the other hand, the act should not prohibit a fiduciary from counseling the individual contractor that the Fund might accept less than the full amount due in settlement of a Fund claim. *In other words the act must be construed to differentiate between advocating a course of action or a solution and having the power to take that course or implement that solution.*

432 F.Supp. at 672 (emphasis added).

The *Curren* case demonstrates that fiduciaries have dual capacities which are permissible under ERISA. The case is also useful in bringing to this Court's attention the fact that more often than not employees of employer associations and union business agents sit as trustees of the § 302(c)(5) trusts. *Accord, Culinary Workers & Bartenders Union No. 596 Health & Welfare Trust v. Gateway Cafe, Inc.*, 588 P.2d 1334 (Wash. 1979).

The Third Circuit Court of Appeals recognized the facts and circumstances involved in the instant case. Their opinion should not be reversed based on straw grasping ERISA arguments that have no bearing in a case involving structural deficiencies in establishing the trust.

Last, the holding in *Cutaiar v. Marshall*, 590 F.2d 523 (3d Cir. 1979), demonstrates how the duties a fiduciary has under § 302(c)(5) of the Act and ERISA may be reconciled. In *Cutaiar*, the trustees were deadlocked over whether the

pension fund should loan money to the welfare fund to which they were also trustees. Pursuant to § 302(c)(5) of the Act, an impartial umpire was appointed. The umpire ruled the loan permissible. After the loan had been made, the Secretary of Labor informed the trustees that the loan violated the adverse representation standards of ERISA because a borrower and a lender in the same transaction are always adverse. The trustees thereafter sought a declaratory judgment that the Secretary's letter was null and void. In upholding the Secretary's opinion the court stated:

> We have no doubt that the pension fund's loan to the welfare fund falls within the prohibition of § 406(b)(2). Fiduciaries acting on both sides of a loan transaction cannot negotiate the *best* terms for either plan. By balancing the interests of each plan, they may be able to construct terms which are fair and equitable for both plans; if so, they may qualify for a § 408 exemption. But without the formal procedures required under § 408, each plan deserves more than a balancing of interests. Each plan must be represented by trustees who are free to exert the maximum economic power manifested by their fund whenever they are negotiating a commercial transaction.

590 F.2d at 530 (emphasis supplied).

But employer and employee representatives on trust funds are not on both sides of a transaction when representing employees or employers in making sure their beneficiaries' interests are protected.

The Court's further statement in response to the trustees' defense that they had relied on the good faith is dicta and unsupported by the law. Even at common law trustees could not be on both sides of a transaction without running afoul of the duty of prudent conduct all trustees had to adhere to long before the passage of ERISA.

B. The Common Law Of Trusts Does Not Prevent Trustees From Being Collective Bargaining Representatives.

Petitioners further rely on common law trust principles in the administration of the funds to attempt to refute Amax's contention that the trustee/fiduciaries may also be collective bargaining representatives. Petitioners further contend that an adverse decision will cause the Board to have jurisdiction over the everyday operation of the trusts. Both of their contentions are incorrect.

As previously-cited decisions of the Board, set forth at p. 20 of this Brief disclose, the Board does have jurisdiction over § 302(c)(5) trusts when they run afoul of § 8 of the Act. Since the Board has always had jurisdiction to remedy discriminatory and unlawful action by trustees, their point is simply irrelevant and out of touch with reality. Why compliance with the Act by trust funds and their trustees should cause any difficulty is not known. Such trusts must comply with many other laws including ERISA. Various provisions of the Internal Revenue code have affected their operations, for example.

Petitioners contend that under the common law, since a fiduciary has a duty of undivided loyalty to the fund, he may not also be a collective bargaining representative.

Petitioners' reliance on various cases are inapposite and not authoritative in this instant case. In *Blankenship v. Boyle*, 329 F.Supp. 1089 (D.D.C. 1971), the court enjoined "the trustees" from Fund operations which afforded advantages to the Union. The injunction however, was granted in the context of a found breach of fiduciary duty. The court did not describe the obligations of trustees under § 302(c)(5) of the Act.

In *United Marine Division, Local 333 v. Essex Transportation Co.*, 216 F.2d 410 (3d Cir. 1954), the language indicating that certain trustees were not representatives of the employees was used in connection with a finding by the

court that a promise to make payments to the trustees of a trust by an employer which was not a party to the trust was not within the prohibitions of § 302(a) and (b) of the Act.

Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968), involved a suit alleging coverage under a § 302(c)(5) trust. The issue before the court was whether the trustees' interpretation of the trust was arbitrary and capricious. The Court, without careful analysis, in dictum (footnote 5) and relying on *Essex Transportation*, supra, dismissed that claim but, in effect, recognized the dual role of trustees.

Petitioners also rely heavily on *Toensing v. Brown*, 374 F.Supp. 191 (N.D. Cal. 1974), *aff'd*, 528 F.2d 69 (9th Cir. 1975), which supports their case not at all. In *Toensing*, plaintiffs argued that the trustees of a § 302(c)(5) trust violated the sole and exclusive benefit rule of § 302(c)(5) by increasing retirement benefits for persons retiring after July 1, 1971, while not increasing benefits to retirees who retired before that date. In holding for the trustees, the district court stated, in response to plaintiffs' argument that the trustees must be completely independent, that:

> Indeed the implication of plaintiffs' position seems to be that if the trustees' actions are clearly consistent with and further the interests of the union and employers, those actions are suspect even if they are actuarially sound and otherwise consistent with the interests of the beneficiaries of the trust fund. If only such complete independence of the trustees had been sought however, Congress would not have enacted § 186(c)(5) in its present form. That section requires that employees and employers be equally represented in the administration of the trust fund. It does not prohibit a person from serving both as collective-bargaining representative and as trustee of the trust fund. Congress intentionally placed the trust fund provisions within the collective bargaining context,

> believing that the trust fund was best managed when the contending views of employer and union were resolved in the best interests of the beneficiaries.

374 F.Supp. at 195 (emphasis supplied).

Aside from case law, Petitioners cite several secondary sources. Although Amax believes Petitioners have erroneously focused their arguments on the administration of the trust rather than its structure, the *Restatement (Second) of Trusts* is not without reference to the possible dual capacity of trustees. The *Restatement (Second) of Trusts* § 170(2) (1959) provides:

> The trustee in dealing with the beneficiary on the trustees' own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know.

Even under common law such dealings were required of a trustee. This section indicates, or at an absolute minimum implies, that a trustee, although under a duty of loyalty, may act in other capacities.

Petitioners cite *Lamb v. Carey*, 498 F.2d 789 (D.C. Cir.), *cert. denied*, 419 U.S. 869 (1974), but it does not do anything more than establish the importance of the representative capacity of § 302(c)(5) representatives and their dual roles. In this case, trustee Carey was replaced by the union as its representative trustee in the UMW Trusts, absent a showing of wrongdoing, simply because he did not cooperate with the new union leadership. This case establishes that a relationship exists between a trustee and the appointing party.

C. The Multiemployer Pension Plan Amendments Act of 1980 Does Not Prevent Trustees From Being Collective Bargaining Representatives.

Regardless of Petitioners' arguments[6] that Congress specifically disapproved of the decision in the instant case and regardless of the Union's argument that by allowing this decision to stand, the Court would be putting multiemployer plans in jeopardy, Congress in amending ERISA did not make it illegal to withdraw from these multiemployer plans. Furthermore, the Union implies (Union Br. at 27) that independent signators may in fact be able to enter cheaper, or more aptly put, more cost efficient plans if they withdraw. This brief has already brought to the Court's attention that Amax proposed a better single employer plan. Never has Congress evidenced any intention to require employers to maintain participation in inefficient plans solely to protect their integrity.

Multiemployer plans will not collapse if employers through collective bargaining withdraw either wholly or partially. In either instance the withdrawing employer would have to fund the unfunded vested benefits. *See* §§ 104, 108(c) & (d). Congress has also provided for a "free look" so that employers may enter multiemployer plans and later withdraw if found unsatsifactory. Congress has been and probably will continue to have concern about such plans as long as they continue to accumulate sizable assets or pursue unwise funding. But the case at bar will not jeopardize participation in the plans. A holding affirming the Third Circuit Court of Appeals' decision will support the salutary policies of the Act by encouraging bargaining on a unit-by-unit basis rather than forcing labor relations disputes on another unit; while at the same time depriving the

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[6] Statements made by members of Congress years after enactment of § 302 and ERISA have very little, if any, authoritative status. *See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Romeo Community Schools v. HEW*, 438 F.Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

other of some measure of control over the selection of its representatives and voice in its own solution of its own collective bargaining disputes. To overturn the decision of the Third Circuit will result in an invitation to strong bargaining units to overwhelm the significance of appropriate units and the right of employers to select their own bargaining representatives—two of the linchpins in our national free collective bargaining policy.

CONCLUSION

The courts, federal and state, have recognized that:

> A Section 302 trust fund does not fit the categories of an ordinary trust and to that extent is *sui generis* and thus requires compliance with the objectives of Section 302.

Alvares v. Erickson, 514 F.2d 156, 166 (9th Cir. 1975). As a unique kind of trust, the usual principles or requirements of trust law cannot be readily superimposed. Congress clearly recognized that union representatives were trustees and nothing in the enactment of § 302(c)(5) was to deprecate their union status. Instead, Congress intended equal employer representation on the trust. Thus, there was clear recognition by Congress that the trustees automatically had collateral interests.

For the Petitioners to represent to this Court that the trustees "are solely fiduciaries owing undivided loyalty to the beneficiaries of such a plan" (NLRB Br. at 9) is without foundation in fact, practice, or law. The decisions of the Board itself refute such a statement. Moreover, the Board's attempt to distinguish its decisions (NLRB Br. at 42, n. 29) is a contradiction in terms and actions. In *The Crescent* case, as the dissenting Chairman Fanning makes clear, the trustees were exercising their discretionary functions in the internal administration of the trust. Yet, the Board majority found that the union trustees were acting as union

representatives while they were exercising these discretionary functions. Thus, the Board's argument that trustees are not representatives within the ambit of § 8 of the Act is not in keeping with Board decisions.

Where, as in the instant case, the trustees have wide discretion, such as the right to structurally change the trust agreement, to make decisions regarding employer participation, rates, contributions, and carriers, to adjust grievances, and where the trustees have actually participated in the collective bargaining negotiations, the trustees are representatives within the real meaning of representation under the Act. And where Amax is negotiating a significantly different collective bargaining agreement from the BCOA Agreement, with different health and pension plan terms, but where the *new* trusts are based exclusively on the BCOA Agreement which is at odds with Amax's agreement, the BCOA-appointed new-trust trustee cannot properly or adequately represent Amax.

For the reasons set forth above, there is no basis for this Court to reverse the Court of Appeals. There are no conflicts between the Courts of Appeals in the subject matters. Likewise, there are no conflicts between or within the federal statutes. In essence, the arguments advanced are grounded upon the Board's and the Union's disagreement with the Court of Appeals' correct interpretation and application of the pertinent statutory provisions and case law.

It is submitted that the Court of Appeals' decision should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

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UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the management-appointed trustee of a jointly administered multiemployer trust fund established under Section 302(c)(5) of the Labor-Management Relations Act of 1947, 19 U.S.C. 186(c)(5), is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B).

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Sheet Metal Workers' International Association, 234 N.L.R.B. 1238, petition for review pending *sub nom. Central Florida Sheetmetal Contractors Ass'n* v. *NLRB*, No. 79-2396 (5th Cir.).....9, 10, 20
Simpson v. *United States*, 435 U.S. 6 32
Toensing v. *Brown*, 528 F.2d 69 .....16, 24, 36, 39
United Brotherhood of Carpenters, Local 1913 (Fixtures Unlimited), 213 N.L.R.B. 363, rev'd in pertinent part and enforced as modified on other grounds, 531 F.2d 424 42
United Marine Division, ILA v. *Essex Transportation Co.*, 216 F.2d 410 28
United Slate, Tile & Composition Roofers, Local No. 220 (Jones and Jones, Inc.), 177 N.L.R.B. 632 20

Cases—Continued Page

United States v. *Carter*, 353 U.S. 210 36
United States v. *Ryan*, 350 U.S. 299 .....16, 26, 38-39
Walsh v. *Schlect*, 429 U.S. 401 26
Woods v. *City National Bank & Trust Co.*, 312 U.S. 262 22

Statutes:

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C. 1001 *et seq.* 2, 4, 20
Section 3(1) and (2), 29 U.S.C. 1002(1) and (2) 29
Section 3(7), 29 U.S.C. 1002(7) 29
Section 3(8), 29 U.S.C. 1002(8) 29
Section 401, 29 U.S.C. 1101 *et seq.* 4, 14
Section 403(a), 29 U.S.C. 1103(a) 4, 31
Section 403(c)(1), 29 U.S.C. 1103(c)(1)....4, 14-15, 30
Section 404(a), 29 U.S.C. 1104(a) 31
Section 404(a)(1), 29 U.S.C. 1104(a)(1)....4, 14, 29
Section 405(a), 29 U.S.C. 1105(a) 30
Section 405(a)(3), 29 U.S.C. 1105(a)(3)..... 42
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Section 406(b)(2), 29 U.S.C. 1106(b)(2)..... 4, 30
Section 407, 29 U.S.C. 1107 .....4-5, 14, 29
Section 408, 29 U.S.C. 1108 30
Section 408(c)(3), 29 U.S.C. 1108(c)(3)..... 30, 31
Section 4041, 29 U.S.C. 1341 *et seq.* 38
Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.* 2
Section 302, 29 U.S.C. 186 2
Section 302(c)(5), 29 U.S.C. 186(c)(5) .....*passim*
Section 302(c)(5)(A), 29 U.S.C. 186(c)(5)(A) 2, 3, 13
Section 302(c)(5)(B), 29 U.S.C. 186(c)(5)(B) 3, 7, 14, 23

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Section 302(c)(5)(C), 29 U.S.C. 186(c)(5)(C) 3
Section 302(c)(7), 29 U.S.C. 186(c)(7), as amended by Pub. L. No. 91-86, 83 Stat. 133.. 40

Labor Management Reporting and Disclosure Act of 1959, Section 501, 29 U.S.C. 501 28

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208:

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Section 3(a)(4)(A), 94 Stat. 1209 ..... 5, 18, 41
Section 3(c)(2) and (3), 94 Stat. 1209-1210.. 32, 41
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Section 7, 29 U.S.C. 157 42
Section 8(a)(5), 29 U.S.C. 158(a)(5) 39, 42
Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B) ..... *passim*
Section 8(b)(3), 29 U.S.C. 158(b)(3) ..8, 10, 12, 42
Section 8(b)(4)(A), 29 U.S.C. 158(b)(4)(A) 6
Section 8(d), 29 U.S.C. 158(d) 19, 38, 42
Section 8(e), 29 U.S.C. 158(e) 11

Miscellaneous:

ABA *Labor Relations Law* (1977) 41
G. Bogert, *Trusts and Trustees* (rev. 2d ed. 1978) 21, 22, 37
93 Cong. Rec. (1947):

p. 3565 25
p. 3837 36
p. 4143 36
p. 4678 24
p. 4746 28
p. 4747 ..... 26, 28
p. 4753 25

126 Cong. Rec.:

H7902 (daily ed. Aug. 26, 1980) 15, 34
S10104 (daily ed. July 29, 1980) 15, 33

Miscellaneous—Continued Page

Department of Labor, *Pension and Welfare Benefit Programs: Study of Multi-Employer Plans* (1979) 18
H.R. 3020, 80th Cong., 1st Sess. (1947) 40
H.R. Conf. Rep. 510, 80th Cong., 1st Sess. (1947).. 25
H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. (1974) 29, 31
H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947).... 25, 35-36, 40
H.R. Rep. No. 1370, 90th Cong., 2d Sess. (1968).... 40
H.R. Rep. No. 91-286, 91st Cong., 1st Sess. (1969).. 40
H.R. Rep. No. 93-533, 93d Cong., 1st Sess. (1973).. 31, 32
H.R. Rep. No. 93-779, 93d Cong., 2d Sess. (1974).. 32
H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974).. 18
H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974).. 15, 32
H.R. Rep. No. 96-869 (Parts 1 & 2), 96th Cong., 2d Sess. (1980) 5, 18, 33
NLRB, *Legislative History of the Labor Management Relations Act of 1947*, Vols. I & II (1948).. 24, 25, 26, 27, 36, 40
Restatement (Second) of Trusts (1959) 21
Scott, *The Fiduciary Principle*, 37 Calif. L. Rev. 539 (1949) 21
II *Scott on Trusts* (3d ed. 1967) 21, 37
S. Rep. No. 105 (Parts 1 & 2), 80th Cong., 1st Sess. (1947) 25, 26, 35, 36, 40
S. Rep. No. 93-127, 93d Cong., 1st Sess. (1973).... 31, 32
S. Rep. No. 93-383, 93d Cong., 1st Sess. (1973).... 31, 32
Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, Vols. II & III (Comm. Print 1976) 31, 32

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-289

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

No. 80-692

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a)[1] is reported at 614 F.2d 872. The decision and order of the National Labor Relations Board (Pet. App. 43a-227a) are reported at 238 N.L.R.B. 1583.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a-40a) was entered on April 3, 1980. A petition for rehearing was denied on May 29, 1980 (Pet. App.

[1] "Pet. App." refers to the appendix to the petition in No. 80-692.

41a-42a). The petition for a writ of certiorari in No. 80-289 was filed on August 26, 1980. On September 18, 1980, Justice Brennan extended the time within which a petition for a writ of certiorari could be filed until October 26, 1980 (a Sunday), and the petition in No. 80-692 was filed on October 27, 1980. Both petitions were granted on January 19, 1981 (A. 298-299).[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*; the Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.*; and the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, are set forth at Pet. App. 228a-255a.

STATEMENT

A. The Federal Regulation Of Pension And Other Welfare Funds

1. In 1947, Congress first began to regulate pension and other welfare funds. Although Section 302 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 186, generally prohibits employer payments to any representative of his employees, Section 302(c)(5), 29 U.S.C. 186(c)(5), permits employer contributions to a welfare trust fund provided that the fund satisfies various requirements. For example, qualifying welfare funds must be in the form of a trust. See 29 U.S.C. 186(c)(5)(A). The fund can provide only certain types of benefits

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[2] The grant in No. 80-289 was limited to Question 1, which is the same question presented by the petition in No. 80-692.

for employees and their families and dependents,[3] and the basis for such payments must be specified in a written, detailed agreement with the employer. See 29 U.S.C. 186(c)(5)(A) and (B). The fund must also be audited annually, and the results of the audit must be made available to all interested persons. 29 U.S.C. 186(c)(5)(B). Furthermore, pension or annuity funds are to be kept in a trust separate from other welfare funds. 29 U.S.C. 186(c)(5)(C).

In addition to these requirements, Section 302(c)(5)(B) directs that "employees and employers [be] equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon * * *." 29 U.S.C. 186(c)(5)(B). Thus, the employees and the employers are required to select an equal number of trustees for such funds, and may jointly agree upon any number of other persons as trustees. If the trustees of the fund deadlock, Section 302(c)(5)(B) further provides that the trustees may select a neutral arbiter or "in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office * * *." 29 U.S.C. 186(c)(5)(B).

2. In 1974, Congress enacted a more comprehensive scheme of pension and welfare fund regulation.

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[3] The trust funds are limited to paying "for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance." 29 U.S.C. 186(c)(5)(A).

The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829, codified at 29 U.S.C. 1001 *et seq.*, sets forth detailed requirements concerning the creation, administration, and termination of pension and welfare funds. See generally *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980). In particular, Part 4 of Title I of ERISA (29 U.S.C. 1101 *et seq.*) imposes various duties and restrictions on the trustees of such pension funds, and limits or prohibits certain types of transactions.

Thus, Section 403(a) of ERISA requires that "all assets of an employee benefit plan shall be held in trust by one or more trustees * * * and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan * * *." 29 U.S.C. 1103(a). Section 403(c)(1) further provides that, with certain limited exceptions, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1103(c)(1).

Moreover, Section 404(a)(1) establishes a prudent man standard of care for all trust fiduciaries, and requires that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1). Section 406(b)(2) prohibits a trustee from "act[ing] in any transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106(b)(2). And Sections 406(a)(1)(E) and 407

limit the amount and kinds of employer property and securities that a trust may acquire. See 29 U.S.C. 1106(a)(1)(E) and 1107.

3. Recognizing that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans" (Section 3(a)(3) of the Multiemployer Pension Plan Amendments Act of 1980 ("1980 Act"), Pub. L. No. 96-364, 94 Stat. 1209), Congress amended ERISA in 1980 specifically to address the special problems of multiemployer trust funds. Because "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations" (Section 3(a)(4)(A) of the 1980 Act, 94 Stat. 1209), Congress established a comprehensive statutory scheme regarding the withdrawal from and termination of multiemployer pension plans. In particular, Congress determined to eliminate an employer's financial incentive to withdraw from a multiemployer plan by requiring a withdrawing employer to continue funding a proportional share of the plan's unfunded benefit obligations. See Section 104 of the 1980 Act, 94 Stat. 1217; H.R. Rep. No. 96-869, 96th Cong., 2d Sess., Part I, at 51-55, 65-70, 73-90 and Part II, at 4-7, 10-11, 14-31, 42 (1980).

B. Proceedings Below

1. Amax Coal Company, a division of Amax, Inc., is in the business of mining coal, primarily in deep shaft bituminous mines located in the midwestern United States. It bargains with the United Mine Workers of America ("the Union") for its midwestern mines as a member of the Bituminous Coal

Operators Association ("BCOA"), a nationwide multiemployer group. In 1972, Amax opened the Belle Ayr Mine in Wyoming, its first sub-bituminous surface mine. Although that mine, like most western surface mines, did not become a member of BCOA, Amax and the Union agreed to a contract regarding the Belle Ayr Mine, which was patterned after the BCOA national contract. Pursuant to this contract, Amax contributed specified amounts to the Union's national pension and welfare trust funds (Pet. App. 3a, 76a-79a; A. 25, 33-34, 42-43, 49, 75).

In January 1975, after the western surface mine contracts, including the Belle Ayr Mine contract, had expired,[4] the Union struck the Belle Ayr Mine and other employers. Amax resisted the Union's attempts to compel establishment of a multiemployer bargaining group,[5] and, in February 1975, the Union, after learning that the Board's Regional Director was preparing to issue a complaint, began separate negotiations with Amax regarding the Belle Ayr Mine. These negotiations were unproductive, however, and by mid-March 1975, the parties had reached an impasse on several points. During the week of March 17, 1975, Amax resumed operations at the Belle Ayr Mine under the terms of its last contract offer. Al-

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[4] These contracts, like the BCOA national contract, were originally scheduled to expire on November 12, 1974, but they had been extended for two months (Pet. App. 3a-4a, 46a-48a, 80a-84a; A. 99).

[5] The Board found that, insofar as the strike was designed to compel Amax to bargain through a multiemployer group, the Union had violated Sections 8(b)(1)(B) and 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B) and 158(b)(4)(A). See Pet. App. 45a-56a. The court of appeals affirmed this finding (Pet. App. 7a-12a), which is not before this Court.

though sporadic negotiations occurred during the next year, no agreement was ever reached (Pet. App. 3a-7a, 46a-51a, 80a-125a; A. 38-42, 49-54, 58-63, 224-226).

In particular, Amax would not agree to continue making its pension and welfare contributions to the Union's existing national trust funds. These funds provide comprehensive health and retirement benefits to coal miners and their families. In accordance with Section 302(c)(5)(B) of the LMRA, three trustees administer the funds: one trustee selected by management, one trustee selected by the Union, and one trustee jointly selected by the other trustees. See 29 U.S.C. 186(c)(5)(B); page 3, *supra*. At the time of the Belle Ayr negotiations, the three trustees of the national funds had been chosen and were administering the funds. Amax had participated in the prior selection of the management-appointed trustee through its membership in the BCOA. It claimed the sole right to appoint its own trustee, however, with regard to any trust fund covering the employees of the Belle Ayr mine, which was not part of the BCOA bargaining unit (Pet. App. 57a, 135a-137a & n.48; A. 34-35, 37-39, 47, 49-50, 52-54, 272-273).

The collective bargaining agreement sets the level of employer contributions to the particular trust fund. The trust documents, in turn, establish the amount and eligibility requirements for each category of benefit, and the amount of employer contributions to be allocated to each class of beneficiary. Within this framework, the trustees exercise significant discretion regarding the assets of the trust and administration of the fund, including the determination of eligibility for benefits, the approval of insurance carriers, and the investigation of insurance claims. In addition, the trustees have the authority to decide

whether an employer has failed to make a required contribution and, where appropriate, to pursue legal remedies against the employer on behalf of the beneficiaries. The trustees also have the power to reduce or suspend the payment of benefits if there is a shortfall in fund assets, and may propose amendments to the trust instruments for the consideration of the employers and the Union (Pet. App. 57a-58a, 135a-137a; A. 97-98x, 241-269, 274-277).

2. The Board unanimously concluded that the Union did not violate Sections 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B) and 158(b)(3), by bargaining to impasse and striking in support of its proposal that Amax continue to contribute to the Union's existing national pension and welfare trust funds with regard to the Belle Ayr employees. The Board observed that proposals concerning employer contributions to employee benefits funds are unquestionably mandatory subjects of bargaining (Pet. App. 58a). The Board rejected Amax's claim that, notwithstanding the otherwise mandatory nature of the Union's trust fund proposal, the Union's insistence on an existing trust fund was unlawful, because it coerced Amax in its selection of a collective-bargaining representative by forcing it to accept the previously selected management-appointed trustee of the Union's existing multiemployer trust fund. Affirming in relevant part the decision of the administrative law judge, the Board held that "the trust funds' management trustee is not a collective-bargaining representative within the meaning of Section 8(b)(1)(B) of the Act" (Pet. App. 57a).

The Board explained that the trustees of a jointly administered, multiemployer trust fund are not collective-bargaining representatives because such trus-

tees "are solely fiduciaries, owing undivided loyalty to the beneficiaries of such a plan" (Pet. App. 58a). This distinction had been fully explicated in the Board's prior decision in *Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238 (1978), petition for review pending *sub nom. Central Florida Sheet Metal Contractors Ass'n* v. *NLRB*, No. 79-2396 (5th Cir.) (cited with approval at Pet. App. 58a-59a):

> [W]e conclude that the * * * trustees are not collective-bargaining representatives within the meaning of Section 8(b)(1)(B) of the [NLRA]. In arriving at this conclusion, we note first that, by insulating an employer from union interference in the selection process, Section 8(b)(1)(B) ensures that an employer may bargain through a freely chosen representative that is completely faithful to his interests. Indeed, an individual or entity that possesses duly delegated authority to act as a bargaining agent must, in conformity with the most basic principles of agency law, follow the instructions and act in the sole interest of his appointing party. * * * [H]owever, the trustees of a joint trust fund * * * are required to act solely in the interests of the beneficiaries of the trust fund. The fiduciary obligations imposed on the trustees are of overriding importance, and, although they should, of course, carefully consider all recommendations submitted by the parties who have appointed them, the trustees are bound to exercise their independent judgment when making decisions with respect to the administration of the trust fund. We therefore conclude, in agreement with the weight of judicial precedent on this issue, that there is nothing in either the statute or its underlying legislative history to support the contention that Congress intended that trust funds established

> pursuant to Section 302(c)(5) [of the LMRA] are to deviate from the established principle of trust law that a trustee must always act in a manner that operates solely to the advantage of the beneficiaries.

234 N.L.R.B. at 1248 (footnote omitted).[6]

Since the trustees of a fund established under Section 302(c)(5) of the LMRA are not collective-bargaining representatives, the Union's demand that Amax contribute to the existing trust funds did not restrain or coerce Amax in violation of Section 8(b)(1)(B) of the NLRA, even though the management trustee of the fund had previously been selected. And, since the Union's proposal otherwise concerned a mandatory subject of bargaining (see *Sheet Metal Workers'*, *supra*, 234 N.L.R.B. at 1243-1245), the Union's bargaining to impasse and striking over the welfare and pension fund issue did not run afoul of its obligation to bargain under Section 8(b)(3). Accordingly, the Board dismissed this portion of the complaint (Pet. App. 59a).

The Board further concluded that the Union did not violate Section 8(b)(3) of the NLRA by bargaining in bad faith, after the commencement of the separate Belle Ayr negotiations in February 1975 (Pet. App. 44a n.3, 203a-213a). The administrative law judge, affirmed by the Board, found that "[t]he record does not establish that the UMWA [bargained] * * * with a closed mind or from a fixed inflexible

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[6] The Secretary of Labor filed an amicus curiae brief in both this case and in *Sheet Metal Workers'* expressing the view that "the fiduciary obligations imposed by ERISA are diametrically opposed to the obligations of a collective-bargaining representative" (234 N.L.R.B. at 1246). The Secretary also concurs in this brief, which reflects the joint views of the Board and the Secretary.

position or was rigidly unwilling to consider seriously any possible alternatives to [its proposals]" (*id.* at 205a). The ALJ noted that "[t]he fact that the UMWA violated the Act by insisting to impasse that Amax agree to contract provisions containing nonmandatory and illegal bargaining subjects, and further violated the Act by striking Amax for an object of securing a contract which included illegal provisions, does not support an inference that the UMWA was engaged in overall bad-faith bargaining" (*id.* at 209a).[7] He therefore concluded (*id.* at 213a; emphasis in original & footnote omitted):

> Based on the foregoing, and the entire record, I find that the UMWA's bargaining stance and conduct, *considered in its totality*, does not establish a case of overall bad-faith bargaining. Accordingly, I shall recommend that this portion of the complaint be dismissed.

3. On appeal, a two-judge panel of the court of appeals reversed in part.[8] The court agreed with the Board that the Union had not bargained in bad faith

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[7] As noted above (note 5, *supra*), the Board found that the Union violated the NLRA by attempting to coerce Amax into joining a new multiemployer bargaining group being formed by several other western surface mines, and it further found, *inter alia*, that the Union violated the NLRA by failing to notify properly the Federal Mediation and Conciliation Service of its dispute with Amax before striking, and by insisting to impasse upon several contract clause proposals that would have violated Section 8(e) of the NLRA, 29 U.S.C. 158(e) (Pet. App. 127a-128a, 176a-199a). The court of appeals affirmed these findings (Pet. App. 7a-12a, 24a-30a), and they are not before this Court.

[8] Although Judge Gibbons heard oral argument in this case in the court of appeals, he did not participate in the decision. See Pet. App. 1a n.*.

(Pet. App. 30a). But it rejected the Board's determination regarding the status of management-appointed trustees of a joint trust fund and held that such trustees are collective-bargaining representatives covered by Section 8(b)(1)(B) of the NLRA. Relying on its prior decision in *Associated Contractors of Essex County, Inc.* v. *Laborers International Union*, 559 F.2d 222, 227-228 (3d Cir. 1977), the court stated (Pet. App. 13a):

> Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them.

The court of appeals accordingly concluded that the Union had coerced Amax in its selection of a collective-bargaining representative and had unlawfully refused to bargain insofar as the Union had insisted on its proposal that Amax continue to contribute to the Union's existing national trust funds whose trustees had previously been selected (*id.* at 14a). Because, in the court's view, the Union's behavior thus violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA, the court ordered the Union to cease and desist from "insisting to the point of impasse that Amax * * * participate in the [Union's] multiemployer pension and welfare funds" (Pet. App. 36a).

SUMMARY OF ARGUMENT

This case concerns the proper characterization of a management or union appointed trustee of a jointly-administered, multiemployer trust fund established pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 186(c)(5). Rejecting the concurrent views of the National Labor Relations Board and the Secretary of Labor, the court of appeals has held that such trustees represent the party that appoints them (*i.e.*, the employer or the union), as well as the beneficiaries of the trust fund, and that therefore a management-appointed trustee is a management collective-bargaining representative within the scope of Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B). As a result, a union cannot bargain to impasse and strike about employer contributions to existing multiemployer trust funds, even though the use and continuity of such trust funds is often critical to the portability and stability of employee health and pension benefits. In other words, under the court of appeals' ruling, an employer need not discuss or bargain about an important term or condition of employment, but rather may unilaterally insist upon contributing to a single-employer trust fund. Nothing in the language or history of the federal labor laws supports this illogical result.

The court of appeals' unprecedented ruling rests on the erroneous premise that, following his appointment, a trustee of a jointly-administered trust fund continues to represent the appointing party. Under well settled common law principles, however, a trustee owes an exclusive duty of loyalty to the beneficiaries of the trust and may not act to further the interests

of other parties. The court of appeals nonetheless concluded that Section 302(c)(5)(B) of the LMRA, which provides that "employees and employers [be] equally represented in the administration of such fund[s]" (29 U.S.C. 186(c)(5)(B)), abrogates this common law standard. But although Section 302(c)(5)(B) thus requires an equal balance between the number of trustees appointed by the employers and those appointed by the union, it does not indicate that a trustee once appointed represents the party that appointed him. To the contrary, the language of Section 302(c)(5) as a whole and its legislative history show that Congress intended these funds to be created as formal trusts and to be administered strictly on behalf of the trust beneficiaries. In short, Section 302(c)(5) incorporates rather than abrogates the applicable common law fiduciary standards.

Part 4 of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1101 *et seq.*, resolves any possible doubt on this point. Thus, Section 404(a)(1) of ERISA requires that a trustee "discharge his duties * * * *solely* in the interest of the [trust] participants and beneficiaries and * * * for the *exclusive* purpose of * * * providing benefits to participants and their beneficiaries * * *." 29 U.S.C. 1104(a)(1) (emphasis supplied). In addition, Section 406(b)(2) provides that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106(b)(2). And Section 403(c)(1) specifically declares that except upon termination of a fund or unless necessary to correct an overpayment by an employer to the fund, "the assets of a plan

shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1103(c)(1).

The conclusion of the court of appeals that a management-appointed trustee owes his loyalty both to the trust beneficiaries and to management is thus wholly at odds with the plain meaning of ERISA. As the House Conference Report explains, ERISA imposes "rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries" (H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 295 (1974)), and is designed to "prevent[] a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries" (*id.* at 309). Moreover, in amending ERISA in 1980, Congress reaffirmed that trustees must act solely on behalf of the trust beneficiaries and participants, and it expressly condemned the decision of the court of appeals in this case. 126 Cong. Rec. S10104 (daily ed. July 29, 1980) (colloquy between Sens. Randolph and Williams); 126 Cong. Rec. H7902 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson). See H.R. Rep. No. 96-869 (Part I), 96th Cong., 2d Sess. 67 (1980).

We further submit that, even if a management-appointed trustee could be thought to owe a residual duty to represent the employer that appointed him, the court of appeals erroneously characterized such trustees as collective bargaining representatives within the meaning of Section 8(b)(1)(B). "Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional

concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." *Florida Power & Light Co.* v. *IBEW, Local 641*, 417 U.S. 790, 803 (1974). Thus, Congress enacted Section 8(b)(1)(B) merely to ensure the undivided loyalty of an employer's freely chosen representatives while engaged in collective bargaining and grievance adjustment. See 417 U.S. at 803-805; *American Broadcasting Companies* v. *Writers Guild of America, West, Inc.*, 437 U.S. 411, 422-423, 429-431, 435-436 (1978).

In contrast, a trustee is primarily, if not exclusively, loyal to the beneficiaries of the trust. Indeed, a trustee must represent the beneficiaries of the trust against management if the employer fails to make required contributions. Furthermore, a trustee neither engages in collective bargaining nor adjusts grievances under the collective bargaining agreement. Rather, he administers a trust fund, which is a separate document from the collective bargaining agreement, and he manages the fund assets and resolves disputes between the trust fund and its beneficiaries, who may or may not be employees. In short, a trustee is simply not a collective bargaining representative. Accord, *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971); *United States* v. *Ryan*, 350 U.S. 299, 305 (1956); *Rehmar* v. *Smith*, 555 F.2d 1362, 1370 (9th Cir. 1976); *Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975); *Miniard* v. *Lewis*, 387 F.2d 864, 865 n.5 (D.C. Cir. 1967).

ARGUMENT

THE MANAGEMENT-APPOINTED TRUSTEE OF A JOINTLY ADMINISTERED MULTIEMPLOYER TRUST FUND ESTABLISHED UNDER SECTION 302(c)(5) OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 IS NOT A COLLECTIVE BARGAINING REPRESENTATIVE WITHIN THE MEANING OF SECTION 8(b)(1)(B) OF THE NATIONAL LABOR RELATIONS ACT

At issue in this case is whether a union may bargain to impasse and strike with regard to its proposal that an employer contribute to an existing multiemployer pension or welfare fund.[9] Such multiemployer funds often provide a more secure and effective means of administering the employees' fringe

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[9] Amax erroneously suggests (Br. in Opp. 7-10) that the court of appeals held that the Union bargained in bad faith about the multiemployer pension and welfare fund issue. To the contrary, the court of appeals expressly affirmed the Board's finding that, after the commencement of separate negotiations in February 1975, the Union bargained in good faith. See Pet. App. 30a, 44a n.3, 203a-213a. This Court should not review these concurrent factual determinations. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409-410 (1952).

Amax also incorrectly contends (Br. in Opp. 10) that this case involves the Union's right to "force" an employer to participate in a multiemployer fund. Even if, as we submit, a Union may bargain to impasse with regard to the multiemployer pension fund issue, an employer can, of course, bargain for a single-employer plan and refuse to accede to the Union's proposals—rights that Amax effectively exercised in this case. See also *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 495 (1960) ("the use of economic pressure by the parties to a labor dispute * * * is part and parcel of the process of collective bargaining").

benefits than do single-employer funds.[10] In addition to the "obvious advantages * * * of economies of scale in administrative costs and investments" (*Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3*, 586 F.2d 1367, 1375 (10th Cir. 1978)), multiemployer funds "have an added element of financial strength in that their contributions come from a number of employers who as a group are less likely than comparable single employers to experience business difficulties." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 25 (1974). Furthermore, particularly in industries such as construction or entertainment, where employees typically do not work continuously for one employer, a multiemployer fund will often be the only means of ensuring that an employee can continuously accumulate retirement credits and enjoy continuity of benefits. See, *e.g.*, *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3*, *supra*, 586 F.2d at 1371, 1375; H.R. Rep. No. 96-869 (Part I), 96th Cong., 2d Sess. 53 (1980). In sum, as Congress expressly recognized in the preamble to the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, Section 3(a)(3) and (4)(A), 94 Stat. 1209, "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans" and

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[10] Multiemployer pension plans cover more than 8.8 million employees and pensioners, and total more than $22.7 billion in assets. See Department of Labor, *Pension and Welfare Benefit Programs: Study of Multi-Employer Plans* I-2, I-10, IV-5 (1979) (based on 1975 figures). The number and size of multiemployer funds is growing. See *id.* at I-15 (predicting more than 16 million covered employees by 2000); H.R. Rep. No. 96-869 (Part 1), 96th Cong., 2d Sess. 51-57 (1980).

employer participation in and "withdrawal[] * * * from a multiemployer pension plan * * * affect[s] the plan, its participants and beneficiaries, and labor-management relations." [11]

The court of appeals nonetheless concluded that the Union in this case could not lawfully bargain to impasse and strike with regard to its important multiemployer pension fund proposal. The court reasoned that Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B), which provides that a union may not coerce an employer in its choice of collective bargaining representative, bars a union from bargaining to impasse about employer contributions to an existing multiemployer fund that is administered by previously appointed trustees. In the court of appeals' view, a management-appointed trustee of a fund established in accordance with Section 302(c)(5) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. 186(c)(5), is a collective bargaining repre-

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[11] Because the issue whether an employer contributes to a multiemployer plan directly affects the reliability and availability of employee fringe benefits, a union proposal regarding contributions to a multiemployer plan concerns "wages, hours, and other terms and conditions of employment," and is thus subject to a mandatory bargaining obligation under Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d). See, *e.g.*, *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 498, 500-501, 503 n.15 (1979); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592-593 (1977); *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180-181 (1971). Neither the court of appeals nor Amax has suggested that the Union's proposal in this case does not fall within the scope of Section 8(d). Rather, as discussed *infra*, the contention made is that Section 8(b)(1)(B) of the NLRA constitutes an independent bar to the Union's proposal regarding Amax's continued contributions to existing multiemployer funds.

sentative for purposes of Section 8(b)(1)(B). Accordingly, the court of appeals held that the Union's proposal that Amax continue contributing to the miners' existing multiemployer funds unlawfully circumscribed Amax's unfettered discretion to choose its collective bargaining representative (*i.e.*, the management-appointed trustee), in violation of Section 8(b)(1)(B).[12]

As we now demonstrate, the court of appeals' analysis is egregiously flawed in two respects. First, following his appointment, a trustee ceases to represent the interests of the party that appointed him. Both the common law, which was incorporated and not abrogated by the LMRA, and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 *et seq.*, require that a trustee administer a trust fund solely on behalf of the trust bene-

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[12] Where, as here, the union proposes that an employer contribute to an existing multiemployer fund that is administered by previously appointed trustees, the union is obviously unable to negotiate with the employer about the structure of the plan or the selection of its trustees. In such circumstances, the Board has determined that, since the acceptance of the named trustees is an inseparable part of the proposal to participate in the fund at all, the entire proposal, including the request to accept the previously designated trustees, is a mandatory subject of bargaining. *Sheet Metal Workers', supra*, 234 N.L.R.B. at 1244; *United Slate, Tile & Composition Roofers, Local No. 220 (Jones and Jones, Inc.)*, 177 N.L.R.B. 632, 651 (1969). In other contexts, however, where the proposal would not affect the benefits provided to employees, a union proposal designed to influence the employer's selection of a management-appointed trustee would not be a mandatory bargaining subject. See *NLRB* v. *Local 964, United Brotherhood of Carpenters and Joiners*, 447 F.2d 643, 646 (2d Cir. 1971). See also *Keystone Steel & Wire Division* v. *NLRB*, 606 F.2d 171, 178-179 (7th Cir. 1979).

ficiaries. Thus, a trustee may not represent or otherwise act on behalf of an employer at all. See Point A, *infra*. Moreover, even if a management-appointed trustee could in some sense represent an employer, the court of appeals erroneously concluded that a trustee is a collective bargaining representative within the narrow scope of Section 8(b)(1)(B). As we show in Point B, *infra*, a trustee does not negotiate collective bargaining agreements or supervise day-to-day employer-employee relations, but rather administers the relationship between trust beneficiaries, who may or may not be employees, and the fund.

A. A Management-Appointed Trustee Of A Pension Or Welfare Fund Owes His Sole And Exclusive Duty Of Loyalty To The Fund Beneficiaries

1. *The Common Law.* The court below held that the trustee of a trust fund established pursuant to Section 302(c)(5) of the LMRA represents both the party that appointed him and the beneficiaries of the fund. Under common law principles, however, a trustee has an unwavering duty to "display throughout the administration of the trust complete loyalty to the interests of the beneficiary, and [to] exclude all selfish interests and all consideration of the interests of third persons." G. Bogert, *Trusts and Trustees* § 543 (rev. 2d ed. 1978). See *Restatement (Second) of Trusts* § 170(1) (1959); II *Scott on Trusts* § 170 (3d ed. 1967); Scott, *The Fiduciary Principle*, 37 Calif. L. Rev. 539 (1949). Thus, regardless of the actual injury to the trust beneficiaries, it is well settled that a trustee may not administer a trust for the financial benefit of himself, of the trust settlor (*i.e.*, the employer and the union), or of any other third person. See G. Bogert, *supra*, at § 543. *Restatement (Second) of Trusts* § 170, comment q

(1959) ("The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person"); *In re Bond and Mortgage Guarantee Co.*, 303 N.Y. 423, 103 N.E.2d 721 (1952); *In re Hubbell*, 302 N.Y. 246, 97 N.E.2d 888 (1951); *Lipic* v. *Wheeler*, 362 Mo. 499, 242 S.W.2d 43 (1951). Moreover, in order to insulate the trustee from all temptation and to deter any injury to the beneficiaries, the rule against dual loyalties has been enforced with "[u]ncompromising rigidity." *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, J.). See, *e.g.*, G. Bogert, *supra*, at § 543.

The court of appeals' view (Pet. App. 13a; see Amax Br. in Opp. 15) that fund trustees may nonetheless advance the interest of the party that appointed them "[i]nsofar as it is consistent with their fiduciary obligations" to the trust beneficiaries is thus wholly at odds with the basic thrust of fiduciary law. As this Court explained in *Woods* v. *City National Bank and Trust Co.*, 312 U.S. 262, 268 (1941), any potential conflict of interest may serve "to dilute the undivided loyalty" of the trustee in a manner that "can seldom be measured with any degree of certainty." Accordingly, a fiduciary may not be heard to contend "that, although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one." *Id.* at 269.[13] See also, *e.g.*, *Mosser* v. *Darrow*, 341 U.S. 267, 271 (1951); *In re Bond and Mortgage Guarantee Co.*, *supra*, 303

[13] In *Woods*, the Court concluded that the trustees who breached their duty of exclusive loyalty were not entitled to compensation for the services rendered to the bankrupt estate regardless of whether any unfairness had resulted. 312 U.S. at 268.

N.Y. at 430-431, 103 N.E.2d at 725; *Cutaiar* v. *Marshall*, 590 F.2d 523 (3d Cir. 1979); *Blankenship* v. *Boyle*, 329 F. Supp. 1089, 1094 (D.D.C. 1971), aff'd mem., 511 F.2d 447 (D.C. Cir. 1975).

We submit that Amax's statutory contentions regarding the proper role of pension and welfare fund trustees must be measured against this common law background. In light of the well established rule against dual loyalties, the court of appeals should not have concluded that the LMRA fundamentally alters the common law of fiduciary loyalty unless Congress has unequivocally evidenced its intent to do so. See, *e.g.*, *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980); *Gooding* v. *United States*, 416 U.S. 430, 457-458 (1974); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). However, as we now demonstrate, Congress has expressly determined that all welfare and pension trusts, including those covered by Section 302(c)(5) of the LMRA, shall be administered in accordance with strict fiduciary principles. In short, Congress has adopted rather than abrogated the common law prohibition against dual loyalties.

2. *The LMRA.* The court of appeals' decision rests on Section 302(c)(5)(B) of the LMRA, which provides that "employees and employers [be] equally represented in the administration of such [pension and welfare] fund[s]." 29 U.S.C. 186(c)(5)(B). Although that statute requires an equal balance between the trustees appointed by the employers and those designated by the union, nothing in the language of Section 302(c)(5) indicates that Congress intended that a trustee should in any degree administer a trust fund on behalf of the party that appointed him. To the contrary, Section 302(c)(5) as a whole is "designed not to alter, but to reinforce 'the most fundamental duty owed by the trustee': the

duty of undivided loyalty to the beneficiaries." *Blankenship* v. *Boyle, supra,* 329 F. Supp. at 1095. See *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3, supra,* 586 F.2d at 1373-1375. For example, Congress directed that such funds be established as a written, formal trust, and that the assets of the fund be "held in trust" "for the *sole* and *exclusive* benefit of the employees * * * and their families and dependents." 29 U.S.C. 186(c)(5) (emphasis supplied).[14] At the same time, the LMRA does not explicitly empower an employer to direct or supervise a trustee's decisions or to remove a management-appointed trustee who does not satisfactorily represent the employer's interests. See *Toensing* v. *Brown,* 528 F.2d 69, 72 (9th Cir. 1975); *Lamb* v. *Carey,* 498 F.2d 789, 793-794 (D.C. Cir. 1974).

The legislative history of the LMRA confirms that "the sole purpose" of Section 302(c)(5) is to ensure that employee pension and "welfare funds * * * are legitimate trust funds, used actually for the specified benefits to the employees." 93 Cong. Rec. 4678 (1947) (remarks of Sen. Ball), *reprinted in* II NLRB, *Legislative History of the Labor Management Relations Act, 1947,* at 1305 (1948) (hereinafter "*Leg. Hist. LMRA*"). As Senator Ball, the sponsor of Section

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[14] "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States,* 342 U.S. 246, 263 (1952). Accordingly, the terms "trust" and "sole and exclusive benefit" should be given their ordinary, common law meaning and significance. See also, *e.g., Perrin* v. *United States,* 444 U.S. 37, 42 (1979).

302(c)(5), explained, "all we seek to do by the amendment [Section 302(c)(5)] is to make sure that the employees whose labor builds this fund and who are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753 (1947), *reprinted in* II *Leg. Hist. LMRA* 1332.[15] See also H.R. Rep. No. 245, 80th Cong., 1st Sess. 29, 78-79 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 66-67 (1947); 93 Cong. Rec. 3565 (1947) (remarks of Rep. Case); II *Leg. Hist. LMRA* 1304, 1310-1312, 1321-1322.

The congressional debates further indicate that Congress purposefully directed that employee pension and welfare plans be cast in the traditional trust form precisely because the strict common law fiduciary requirements governing the administration of trusts would best protect the employee beneficiaries. Thus, an opponent of the bill suggested that Section 302(c)(5) was unnecessary because, even without that provision, the "officials who administer [the funds] thereby become trustees, subject to all of the common law and State safeguards against misuse of funds by trustees." II *Leg. Hist. LMRA* 1318 (remarks of Sen. Morse). Senator Taft, the primary author of the LMRA, responded that many existing funds were not currently

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[15] Section 302(c)(5) was a Senate-sponsored amendment to the 1947 bill that was patterned after a similar section in the Case bill (the 1946 version of the LMRA), which had passed Congress but was vetoed by the President. See II *Leg. Hist. LMRA* 1305, 1310 (remarks of Sens. Byrd, Pepper, and Taft); S. Rep. No. 105 (Part 1), 80th Cong., 1st Sess. 52 (1947). A similar proposal was originally defeated in the House, but was agreed to in conference. See II *Leg. Hist. LMRA* 749-757, 782.

established as trusts and that the requirement in Section 302(c)(5) that each fund be a specific and enforceable trust would ensure that the future operations of all such funds would be subject to supervision by a "court of chancery." II *Leg. Hist. LMRA* 1322. See *ibid.* (remarks of Sen. Ball). In sum, Section 302(c)(5) was designed "to prevent the abuse of welfare funds" by "requir[ing] that the fund shall be established in definite, detailed form, in the form of a trust fund, with respect to which the employees can determine their rights and can insist upon them." 93 Cong. Rec. 4747 (1947) (remarks of Sen. Taft), *reprinted in* II *Leg. Hist. LMRA* 1312. See also S. Rep. No. 105 (Part 1), 80th Cong., 1st Sess. 52 (1947) (Section 302(c)(5) "requires * * * such funds * * * be, in fact, trust funds for the employees"); I *Leg. Hist. LMRA* 753, 873; II *Leg. Hist. LMRA* 1498, 1524.

The legislative history also reflects congressional concern about the breach of fiduciary duties by union trustees, including the appropriation of trust assets for a union "war chest." II *Leg. Hist. LMRA* 1312 (remarks of Sen. Taft). See *Walsh* v. *Schlecht*, 429 U.S. 401, 410-411 (1977); *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959); *United States* v. *Ryan*, 350 U.S. 299, 304-307 (1956); *Blankenship* v. *Boyle*, *supra*, 329 F. Supp. at 1094-1095. Contemplating that independent employer-appointed trustees would constitute an additional check against union misuse of employee funds, Congress required that there be an equal balance between the trustees appointed by the union and those appointed by the employers. Nowhere, however, did Congress express the view either that each participating employer had the right to select a trustee or that management-appointed trustees should further the interests of the appointing employers. See *Denver Metropolitan Ass'n of Plumb-*

ing Contractors v. *Journeyman Plumbers Local No. 3, supra*, 586 F.2d at 1373-1375; *Blassie* v. *Kroger Co.*, 345 F.2d 58, 72-73 (8th Cir. 1965); *Local 169, Teamsters* v. *Teamsters Health and Welfare Fund*, 327 F. Supp. 260, 264 (E.D. Pa. 1971).[16]

Moreover, since the sole purpose of Section 302 (c)(5) is to "protect[] the rights of the employees whose toil creates these welfare funds" (II *Leg. Hist. LMRA* 1524 (remarks of Sen. Ball)), it is inconceivable that Congress silently sought to impose a dual loyalty standard on the fund trustees, thereby diluting the common law protections theretofore enjoyed by trust beneficiaries. Likewise, the court of appeals' construction of Section 302(c)(5) would un-

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[16] In fact, the only even arguable indication that Congress may have considered that Section 302(c)(5) was meant to protect any interest of the employers is an isolated statement by Senator Wiley made after the amendment constituting Section 302(c)(5) had passed the Senate. Senator Wiley stated that he understood Section 302(c)(5) to "giv[e] employers their rightful voice in the administration of union welfare funds and [to] limit[] the uses for which the money may be spent." II *Leg. Hist. LMRA* 1471. But Senator Wiley had previously observed that he had "refrained thus far from expressing my views on the measure, largely because I am not a member of the Senate Labor and Public Welfare Committee and did not have the opportunity to examine in the closest detail all of the provisions of the bill" and that his remarks were only "some general thoughts in summary on the nature of this legislation." II *Leg. Hist. LMRA* 1469. Given the repeated statements of Senators Ball and Taft, the sponsors of Section 302(c)(5), that the sole purpose of Section 302(c)(5) was to protect the interests of the employee-beneficiaries (see, *e.g.*, II *Leg. Hist. LMRA* 1305, 1310-1312, 1321, 1322, 1498, 1524), Senator Wiley's off-hand comment is entitled to no weight.

dermine Congress' evident intent to eradicate union manipulation and abuse of welfare funds and "to isolate such welfare funds from labor-management politics." *Blankenship* v. *Boyle, supra*, 329 F. Supp. at 1094. See 93 Cong. Rec. 4746-4747 (1947) (remarks of Sen. Taft). The court of appeals would require a union-appointed trustee to advance the interests of the union against the employer and would thus return the administration of such funds to the arena of labor-management conflict.[17]

For these reasons, even prior to the enactment of ERISA in 1974, the lower courts had uniformly concluded that the trustees of funds established pursuant to Section 302(c)(5) owe their exclusive duty of loyalty to the fund beneficiaries and "do not act as representatives of either the employers or the union." *Miniard* v. *Lewis*, 387 F.2d 864, 865 n.5 (D.C. Cir. 1967). See *United Marine Division, ILA* v. *Essex Transportation Co.*, 216 F.2d 410, 412 (3d Cir. 1954) (trustees are not "representatives of either union or employers"); *Blankenship* v. *Boyle, supra*, 329 F. Supp. at 1095 (Section 302(c)(5) is "designed * * *

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[17] Amax erroneously argues (Br. in Opp. 14) that Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 501, supports its contention that a trustee of a welfare fund may simultaneously represent the interests of the employer or union. Section 501 provides only that a union official occupies a position of trust with regard to the union and its members. There is obviously no potential conflict of interest for a union official to act as both a collective bargaining representative and fiduciary for the same union. This case, however, does not concern whether a trustee of the fund may represent the fund beneficiaries. Rather, here the issue is whether the trustee of the fund, who unquestionably owes a fiduciary duty to the fund beneficiaries, may at the same time represent the potentially adverse interests of the employer.

to reinforce * * * the duty of undivided loyalty to the beneficiaries"). As the discussion below demonstrates, the enactment of ERISA explicitly confirms these principles.

3. *ERISA and the Multiemployer Pension Plan Amendments Act of 1980.* In 1974, Congress codified the strict common law fiduciary standards as applied to the trustees of all pension and welfare funds, including Section 302(c)(5) trusts. See 29 U.S.C. 1002(1) and (2); H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 296, 307 (1974). Part 4 of Title I of ERISA, which is not adverted to at all in the court of appeals' opinion,[18] unambiguously provides that every trustee must act solely on behalf of the trust beneficiaries and may not represent the interests of any other party, including an employer. Thus, Section 404(a)(1) of ERISA requires a trustee to "discharge his duties * * * *solely* in the interest of the participants and beneficiaries and * * * for the *exclusive* purpose of * * * providing benefits to participants and their beneficiaries * * *." 29 U.S.C. 1104(a)(1) (emphasis supplied).[19] Furthermore, Section 406(b)(2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are

[18] The Board's brief and petition for rehearing, as well as the amicus curiae submission of the Secretary of Labor in support of the petitions for rehearing in the court below, extensively discussed the ERISA issue.

[19] ERISA defines "participant" as "any employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan * * *, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. 1002(7). A "beneficiary" is defined as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. 1002(8).

adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106 (b)(2). And Section 405(a) imposes an affirmative duty on each trustee to prevent every other trustee of the same fund from breaching their fiduciary duties, including their duty to act solely on behalf of the trust beneficiaries. See 29 U.S.C. 1105(a).

In addition, the fiduciary provisions of ERISA are specifically designed to insulate the administration of the trust from the employer's interests. Except in limited circumstances involving excess contributions and fund termination, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." Section 403(c)(1), 29 U.S.C. 1103(c)(1). Similarly, Section 406(a)(1)(E) generally prohibits any transaction between the plan and a "party in interest," including an employer, and Section 407 strictly limits the amount and kinds of employer property and securities that the trustee may acquire on behalf of the trust. See 29 U.S.C. 1106(a)(1)(E) and 1107. See also 29 U.S.C. 1108 (authorizing certain exemptions).[20] Moreover, ERISA explicitly vests

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[20] Section 408(c)(3) provides that an officer, employee, agent or other representative of an employer or a union may serve as a fiduciary of a pension plan. 29 U.S.C. 1108(c)(3). Contrary to Amax's assertion (Br. in Opp. 15-16), that statute does not authorize a trustee once appointed to act as the representative for the appointing party in administering the trust. Rather, Section 408(c)(3) permits "[a] trustee of such a fund * * * [to] be the agent of the union [or the employer] *in other contexts*" and to discharge his different roles "in separate spheres." *NLRB* v. *Construction & General Laborers' Union Local 1140*, 577 F.2d 16, 20 n.6, 21 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979). See also *Curren* v. *Freitag*, 432 F. Supp. 668, 672 (S.D. Ill. 1977). In fact, by

the "exclusive authority and discretion to manage and control the assets of the plan" in the trustees alone, and not in the employer or the union. 29 U.S.C. 1103(a).

The extensive legislative history of ERISA confirms what the unambiguous language of the Act makes plain: In administering an employee trust fund, a trustee may not represent the interests of the employer in any degree or fashion. Accord, *Denver Metropolitan Ass'n of Plumbing Contractors* v. *Journeyman Plumbers Local No. 3, supra*, 586 F.2d at 1375; *NLRB* v. *Construction & General Laborers' Union Local 1140*, 577 F.2d 16, 20-21 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979); *Morgan* v. *Laborers Pension Trust Fund*, 443 F. Supp. 518, 530 (N.D. Cal. 1977). As Amax concedes (Br. in Opp. 14-15), ERISA incorporates the strictest common law fiduciary standards. See H.R. Conf. Rep. No. 93-1280, *supra*, at 295, 306; S. Rep. No. 93-127, 93d Cong., 1st Sess. 30, 33 (1973); H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 11-13 (1973); Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., II *Legislative History of the Employee Retirement Income Security Act of 1974*, at 3370 (Comm. Print 1976) (hereinafter "*Leg. Hist. ERISA*"). The legislative reports further show that Congress rigorously tightened and supplemented those standards in order "to reduce substantially the potentialities for [fiduciary] abuse." [21] S. Rep. No. 93-383, 93d Cong., 1st Sess. 31

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its own terms, Section 408(c)(3) merely constitutes a clarification of Section 406 of ERISA, and does not exempt a trustee from the duty of exclusive loyalty set forth in Section 404(a). See 29 U.S.C. 1108(c)(3).

[21] At the same time, Congress provided new remedies for breaches of fiduciary duty including excise tax penalties and criminal punishment. See S. Rep. No. 93-383, 93d Cong., 1st Sess. 31-32 (1973).

(1973). See *id.* at 95, 97-106; H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 6 (1974); II *Leg. Hist. ERISA* 3370. In particular, Congress sought to prohibit trustees "from engaging in actions where there would be a conflict of interest with the fund, *such as representing any other party dealing with the fund.*" S. Rep. No. 93-383, *supra*, at 8, 32 (emphasis supplied). See *id.* at 104; S. Rep. No. 93-127, *supra*, at 46; H.R. Rep. No. 93-533, *supra*, at 13, 21; II *Leg. Hist. ERISA* 1726, 3378-3379, 3474, 3495; III *Leg. Hist. ERISA* 4562, 4759, 4803. In other words, the fiduciary responsibility provisions of ERISA are designed to prevent a trustee "from being put into a position where he has duel loyalties and therefore he cannot act exclusively for the benefit of a plan's participants and beneficiaries" (H.R. Conf. Rep. No. 93-1280, *supra*, at 309)—precisely the "position" created by the decision below.[22] See also *Cutaiar* v. *Marshall*, 590 F.2d 523, 529-530 (3d Cir. 1979).

Finally, Congress amended ERISA in 1980 to foster "the maintenance and growth of multiemployer pension plans * * * [and] to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans." Section 3(c)(2) and (3) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1209-1210. See also pages 5 & 18-19, *supra*. This legislation imposes numerous new re-

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[22] In our view, the requirements of ERISA are fully consistent with the trust requirement earlier established in the LMRA. Insofar as there is any conflict between the two statutes, however, ERISA, which is a more recent and specific statute with regard to fiduciary duties, controls. See, *e.g.*, *Busic* v. *United States*, 446 U.S. 398, 406 (1980); *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 618-619 (1980); *Simpson* v. *United States*, 435 U.S. 6, 15 (1978).

sponsibilities upon trustees of multiemployer funds, and Congress reaffirmed that the trustees of such funds must continue to act solely on behalf of the trust beneficiaries and participants. See H.R. Rep. No. 96-869 (Part 1), 96th Cong., 2d Sess. 67 (1980). Indeed, the sponsors of the 1980 Act in both Houses of Congress expressly disapproved the decision of the court of appeals in this case, noting that pension fund trustees have no "obligations to the parties who appoint them," but rather must act "with the sole interest of the plan's beneficiaries in mind." 126 Cong. Rec. S10104 (daily ed. July 29, 1980) (colloquy between Sens. Randolph and Williams).[23]

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[23] The following colloquy occurred during the Senate debates (126 Cong. Rec. S10104 (daily ed. July 29, 1980)):

> MR. RANDOLPH. * * * If the chairman of the committee is agreeable, I wonder if I might address him to clarify a point which concerns me. Although this bill has added new and additional responsibilities of plan trustees, particularly under the reorganization provisions of the bill, is it not correct that this legislation reaffirms the present law, that these plan trustees as fiduciaries still have the sole responsibility, as I understand it, to the beneficiaries of the plan? My concern is based partly on a recent Court of Appeals decision, which I believe will be overturned on appeal, that apparently suggests that the trustee[s] have some obligations to the parties who appoint them. I do not believe that we in the Congress have ever expressed an intent under ERISA or any other Federal law that an agency status should or does exist between trustees and their appointers.
>
> * * * * *
>
> MR. WILLIAMS. I am happy to respond to the Senator from West Virginia that that is the situation and that is correct. In all instances the actions of the trustees

B. Trustees Of A Section 302(c)(5) Employee Trust Fund Are Not Collective Bargaining Representatives Within The Meaning Of Section 8(b)(1)(B) Of The NLRA

The preceding discussion demonstrates that the trustee of an employee pension or welfare fund may not lawfully represent the interests of either the employer or the union in administering the trust. Even if the Court were to disagree with this contention, however, we submit that the decision of the court of appeals is wrong for still another reason. Whatever residual duty of representation a trustee may owe to the party that appointed him, a trustee of an employee fund cannot properly be characterized as a collective bargaining representative covered by Section 8(b)(1)(B) of the NLRA. Hence, the Union properly bargained to impasse and struck with regard to its proposal that Amax continue to contribute to

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must be made with the sole interest of the plan's beneficiaries in mind. That was, that is, and that will be.

Likewise, Representative Thompson stated (126 Cong. Rec. H7902 (daily ed. Aug. 26, 1980)):

> Although this bill has added important new responsibilities for plan trustees, particularly under the reorganization provisions, this legislation simply reaffirms the present law, that these plan trustees as fiduciaries have sole responsibility to the participants and beneficiaries of the plan. A recent Court of Appeals decision, Amax Coal Company against NLRB which was wrongly decided, apparently suggests that the trustees are collective bargaining agents for the parties who appoint them. That is an erroneous interpretation of both ERISA and federal labor law and does not reflect congressional intent.

Congressional intent in amending ERISA is clearly relevant to determining the scope of its original provisions. See *e.g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193-194 (1967).

the miners' existing multiemployer pension and welfare funds.

1. Section 8(b)(1)(B) prohibits a union from restraining or coercing "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. 158(b)(1)(B). Thus, although Sections 8(b)(1)(B) and 302(c)(5) were both part of the 1947 Act, neither provision explicitly refers to the other.[24] Moreover, on its face, Section 8(b)(1)(B) does not apply to every kind of employer representative. Rather, as this Court concluded in *Florida Power & Light Co.* v. *IBEW, Local 641*, 417 U.S. 790, 803 (1974), "[b]oth the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." In other words, Section 8(b)(1)(B) is a narrow provision designed to protect employers from being forced into multiemployer bargaining units and to ensure the undivided loyalty of an employer's freely chosen representatives while they are engaged in collective bargaining and grievance adjustment. See 417 U.S. at 803-805; *American Broadcasting Companies* v. *Writers Guild of America, West, Inc.*, 437 U.S. 411, 422-423, 429-431, 435-436 (1978); S. Rep. No. 105 (Part 1), 80th Cong., 1st Sess. 21 (1947); H.R. Rep.

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[24] Likewise, although the same congressional committees considered the issue of employee funds, multiemployer bargaining, and loyalty of employer representatives—the subject matter of Sections 8(b)(1)(B) and 302(c)(5)—, the legislative history is barren of any indication that Congress considered Section 8(b)(1)(B) to govern the employer-appointed trustees of Section 302(c)(5) funds. See also pages 39-40, *infra*.

No. 245, 80th Cong., 1st Sess. 14-17 (1947); 93 Cong. Rec. 3837, 4143 (1947) (remarks of Sens. Taft and Ellender), *reprinted in* II *Leg. Hist. LMRA* 1012, 1077.[25]

In administering an employee trust fund, an employer-appointed trustee is thus plainly not engaged in conduct regulated by Section 8(b)(1)(B). Even in the court of appeals' view, a trustee is primarily obligated to represent the trust beneficiaries and therefore cannot be loyal to the employer's interests or faithful to his orders. Although the trustees may confer with the collective bargaining parties and may consider their recommendations, such recommendations "are not binding or obligatory" upon the trustees. *Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975). Instead, the trustees "have a duty to exercise their independent judgment in administering [the] trust funds." *Ibid.* See, *e.g.*, *Lamb* v. *Carey*, 498 F.2d 789, 793-794 (D.C. Cir. 1974); pages 21-33, *supra*. Indeed, the trustees have an obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer "for the sole benefit of the beneficiaries of the fund" (*United States* v. *Carter*, 353 U.S. 210, 220 (1957)), and they lack discretion

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[25] The Senate Report defined with specificity the activities to which Section 8(b)(1)(B) was intended to apply (S. Rep. No. 105 (Part 1), *supra*, at 21):

> Thus, a union or its responsible agents could not * * * coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

to compromise such claims in order to benefit either the employer or the union (*Nedd* v. *United Mine Workers*, 556 F.2d 190, 210, 212-213 (3d Cir. 1977)). And in stark contrast to the relationship between a collective bargaining representative and an employer or union, a trustee is paid by the fund and not the appointing party, and he ordinarily may be removed only for cause.[26] Compare *Lamb* v. *Carey*, *supra*; G. Bogert, *supra*, at § 520; and II *Scott on Trusts* § 107.2 (3d ed. 1967); with H.R. Rep. No. 245, *supra*, at 17 (employer need not have as his collective bargaining representative "one whom, for *any* reason, he does not trust").[27]

Moreover, the trustees' exercise of discretion with regard to benefit eligibility and other similar matters (see Pet. App. 136a-137a; Amax Br. in Opp. 12-13) does not constitute collective bargaining or the adjustment of grievances under the collective bargaining agreement. Whereas collective bargaining and

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[26] The UMW trust agreement specifically provides that a trustee may be removed only for cause (A. 272).

[27] As the administrative law judge explained (Pet. App. 145a-146a):

> A primary attribute of individuals who act as bargaining representatives is that they owe undivided allegiance to the union or employer that appoints them and are bound to follow the instructions and act in the interest of their principals. The trustees involved in this case, however, are required by law and by the terms of the UMWA's proposed collective-bargaining agreement to act exclusively in the interest of the Funds' beneficiaries regardless of the consequences to the UMWA or the employers. The trustees are required to consider the recommendations of the employers and the UMWA in "a deliberate fiduciary atmosphere," not in the give-and-take atmosphere of the bargaining table. Moreover, the Funds' trustees differ in other crucial respects from collective bargaining representatives because of the fiduciary duty they owe to the Funds' beneficiaries. * * *

grievance adjustment concern the relationship between the employer and his employees (see, *e.g.*, *Keystone Steel & Wire Division* v. *NLRB*, 606 F.2d 171, 176, 179-180 (7th Cir. 1979)), the trustee primarily manages the fund assets and resolves eligibility questions between the independent trust and the beneficiaries, who may or may not be employees (*Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164-171 (1971)). And, in performing their discretionary duties, the fund trustees must act " 'in a deliberate fiduciary atmosphere' " (*Lamb* v. *Carey, supra*, 498 F.2d at 794), which is antithetical to the "horse trading," compromise, and economic pressures that characterize collective bargaining (see *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 495 (1960)). Furthermore, an employee trust is a distinct (and not necessarily coterminous) document from the collective bargaining agreement, and the termination and modification of trust funds are governed by different statutory provisions from those that govern the termination and modification of collective bargaining agreements. Compare 29 U.S.C. 1341 *et seq.* with 29 U.S.C. 158(d). In addition, Section 302(c)(5) provides for the compulsory arbitration of deadlocks among the fund trustees, whereas Congress rejected compulsory arbitration as a means of resolving collective bargaining disputes. Compare 29 U.S.C. 186(c)(5) with 29 U.S.C. 158(d); *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 218-219 (1979).

In sum, the trustees are administrators of an independent trust fund and their duties are wholly different from those of collective bargaining representatives. Indeed, on two occasions this Court has recognized the distinction between collective bargaining representatives and fund trustees. In *United States*

v. *Ryan*, 350 U.S. 299 (1956), the Court held that the word "representatives" in Section 302 of the LMRA is not limited solely to "exclusive [*i.e.*, collective] bargaining representative[s]." The Court pointed out that if Section 302 covered only collective bargaining representatives, "[p]ayments made * * * to other individuals as trustees [of employee welfare funds] would apparently be excluded from § 302." 350 U.S. at 305. More recently, in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, *supra*, 404 U.S. at 170, the Court, in concluding that there was no anomaly in considering retired workers as "employees" for purposes of Section 302(c)(5) but not for purposes of the bargaining obligation imposed by Section 8(a)(5), observed that "the union's role in the administration of the fund is of a far different order from its duties as collective-bargaining agent." Accord, *NLRB* v. *Construction & General Laborers' Union Local 1140*, *supra*, 577 F.2d at 20-21; *Rehmar* v. *Smith*, 555 F.2d 1362, 1370 (9th Cir. 1976); *Toensing* v. *Brown*, *supra*, 528 F.2d at 72; *Miniard* v. *Lewis*, *supra*, 387 F.2d at 865 n.5.

2. The decision of the court below that Section 8(b)(1)(B) precludes a union from bargaining to impasse and striking with regard to an employer's contributions to a multiemployer fund is wholly at odds with the history and policy of the labor laws. As indicated above (note 24, *supra*), nothing in the legislative history of the LMRA, which contained both Sections 8(b)(1)(B) and 302(c)(5), suggests that Congress intended Section 8(b)(1)(B) to cover the trustees of Section 302(c)(5) funds or otherwise to limit collective bargaining with regard to such funds. To the contrary, the legislative discussion regarding Section 302(c)(5) reflects Congress' understanding that employee funds are a mandatory subject of bar-

gaining. See, *e.g.*, I *Leg. Hist. LMRA* 485 (S. Rep. No. 105 (Part 2), *supra*, at 23 (Minority Report)), 798 (remarks of Rep. Lodge); II *Leg. Hist. LMRA* 1304-1306, 1311-1313 (remarks of Sens. Ball, Byrd, Pepper and Taft). In fact, despite extensive congressional discussion of, and opposition to, John L. Lewis' ongoing demands that each mining employer contribute to the UMW's existing welfare funds that covered numerous employers (see, *e.g.*, I *Leg. Hist. LMRA* 458 (S. Rep. No. 105 (Part 1), *supra*), 612, 672-673, 753 (remarks of Reps. Hartley, Fisher and Case); II *Leg. Hist. LMRA* 1305, 1311-1313, 1315 (remarks of Sens. Byrd and Taft)), Congress specifically rejected proposals that would have made the topic of pension and welfare funds a permissive subject of bargaining and would have prohibited all such funds that were even indirectly established or managed by a union. See H.R. 3020, 80th Cong., 1st Sess. §§ 2(11), 8(a)(2)(C)(ii) (1947), *reprinted in* I *Leg. Hist. LMRA* 39-40, 51; H.R. Rep. No. 245, *supra*, at 20-21, 29-30.

More recently, two subsequent legislative enactments have confirmed Congress' evident views on this point. In 1969, Congress amended Section 302(c) to permit the creation of trust funds for the purpose of scholarships and child care centers. See Pub. L. No. 91-86, 83 Stat. 133, codified at 29 U.S.C. 186(c)(7). Congress explicitly provided that these limited kinds of funds are not a mandatory subject of bargaining. See 29 U.S.C. 186(c)(7); H.R. Rep. No. 1370, 90th Cong., 2d Sess. 2, 4 (1968); H.R. Rep. No. 91-286, 91st Cong., 1st Sess. 3 (1969). No such provision governs the Section 302(c)(5) pension and welfare trusts at issue in this case, however, and, particularly in light of the legislative history described above, none should be implied.

The result reached by the court below would also frustrate the explicit congressional intent informing the 1980 amendments to ERISA. Section 3(a)(4)(A) of the 1980 Act states that "withdrawals of contributing employees from a multiemployer pension * * * adversely affect[s] the plan, its participants and beneficiaries, and *labor-management relations*" (94 Stat. 1209; emphasis supplied). Similarly, Section 3(c)(2) of the Act declares that it is the policy of the 1980 Act to encourage "the maintenance and growth of multiemployer pension plans" (94 Stat. 1209). The court of appeals, on the other hand, would preclude unions from bargaining to impasse and striking over multiemployer funds, thereby jeopardizing the creation of new multiemployer plans and the continued existence of established plans. See ABA *Labor Relations Law* 213-214 (1977).[28]

Finally, the reasonableness of the Board's conclusion that trust fund administration does not constitute "collective bargaining" within the meaning of the NLRA is confirmed by the fact that the contrary conclusion would thrust the Board "into a new area of regulation which Congress [has] not committed to it." *Ford Motor Co.* v. *NLRB*, *supra*, 441 U.S. at 497; *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 499 (1960). For the first time, the discretionary actions of trustees in administering a fund

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[28] In this case, 1786 of the 2009 employers who contribute to the UMWA funds at issue are independent signatories and are not members of BCOA, which selected the employer trustee. A holding that Section 8(b)(1)(B) precludes mandatory bargaining over the multiemployer fund issue would thus provide more than 85% of the contributing employers with a non-bargainable veto over their employees' efforts to maintain the important benefits offered by the multiemployer plans. See pages 17-19, *supra*.

would be subject to the duty of good faith bargaining set forth in Sections 8(a)(5), 8(b)(3), and 8(d) of the NLRA, 29 U.S.C. 158(a)(5), 158(b)(3), and 158(d), and would become subject to the economic pressure that is an integral part of the process of collective bargaining under the NLRA.[29] Additionally, the duty owed to the trust beneficiaries might be diluted because a trustee would be regulated by the Board, the Secretary of Labor, and the courts, and would face the different and possibly conflicting duties imposed by Section 7 of the NLRA, Section 302(c)(5) of the LMRA, and ERISA.[30]

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[29] As Amax notes (Br. in Opp. 17), the Board has found the trustees of joint administered funds to be agents of the employers and the union for certain limited purposes. See, for example, *United Brotherhood of Carpenters, Local 1913 (Fixtures Unlimited)*, 213 N.L.R.B. 363 (1974), rev'd in pertinent part and enforced as modified on other grounds, 531 F.2d 424, 426-427 (9th Cir. 1976) (trustees required to accept contributions provided for under a Board back pay order); *Jacobs Transfer, Inc.*, 227 N.L.R.B. 1231 (1977) (same); *Local 80, Sheet Metal Workers International Ass'n, (Turner-Brooks, Inc.)*, 161 N.L.R.B. 229 (1966) (trustees found to have helped enforce unlawfully obtained agreement of employer to contribute to an industry promotion fund). See also *L & M Carpet Contractors, Inc.*, 218 N.L.R.B. 802 (1975) (employer violated Section 8(a)(5) of the NLRA by refusing to open his books to the trust as required by the bargaining agreement). As the Board pointed out in the instant case (Pet. App. 59a n.15), those decisions have no applicability to the trustees' " 'discretionary functions in the internal administration of the trust,' " which is at issue here.

[30] For example, Sections 405(a)(3) and 405(b)(1)(A) of ERISA require a trustee to prevent any other trustee from breaching his fiduciary responsibilities to the employee beneficiaries. On the other hand, it is a violation of Section 8(b)(1)(B) of the NLRA for a union representative to interfere with the employer's collective bargaining agent's performance of his duties in accordance with the employer's

CONCLUSION

The judgment of the court of appeals with respect to Amax's participation in the Union's pension and welfare funds should be reversed.

Respectfully submitted.

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instructions. *American Broadcasting Companies* v. *Writers Guild of America, West, Inc., supra,* 437 U.S. at 436. Thus, if trust fund administration is "collective bargaining" as the court of appeals concluded, a trustee might well be found to have committed an unfair labor practice merely by fulfilling his obligations under ERISA.

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Nos. 80-289 and 80-692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED MINE WORKERS OF AMERICA,
LOCAL NO. 1854 AND
UNITED MINE WORKERS OF AMERICA,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD
AND AMAX COAL COMPANY,
A DIVISION OF AMAX, INC.,
Respondents

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

AMAX COAL COMPANY,
A DIVISION OF AMAX, INC., ET AL.
Respondent

REPLY BRIEF OF PETITIONERS, UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA

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QUESTION PRESENTED

Whether the management-appointed trustee of a jointly administered multiemployer trust fund established under Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c)(5), is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B).

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REPLY BRIEF OF PETITIONERS, UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, AND UNITED MINE WORKERS OF AMERICA

I. Amax Has Raised Additional Questions and Changed the Substance of the Question Presented, in Violation of Rule 34.1(a). Irrelevant and Immaterial References Should be Disregarded and Stricken by the Court. (Brief of Respondent, pp. 2-6).

In the Summary of Argument, Respondent in its Brief has raised and argued factual and legal questions not presented in the grant of Certiorari. It has urged what it terms "cogent facts" unsupported by references

to testimony as a "backdrop" to its argument (Brief for Respondent, pp. 2-6), cataloguing contentions earlier advanced in its Brief in Opposition, pages 7-10, that the Union's "totality of conduct" clearly established bad faith bargaining. This contention was rejected by the NLRB (Jt. App. 43a-45a, N.3; 203a-213a). It is not before this Court.

These arguments are advanced without documentation to the record, as in Note 2 on page 4 of Brief for Respondent, where it is asserted without proof that the UMW funds "... reduce benefits for all of the participants because of the short fall in funding caused by the 'wildcat' strikes in the BCOA bargaining unit," and subsequently in the numbered paragraphs on pages 4 through 6 of Respondent's Brief.

The use of extraneous matters not substantiated in the record is contrary to the rules. Rule 34.2 does not authorize a respondent, under the guise of presenting a Summary of Argument, to present unsupported factual averments or argument on points not encompassed within the question on which certiorari is granted. Rule 34.1. The unsupported averments and irrelevant arguments contained in the Summary of Argument, pages 2 through 6 of Respondent's Brief, should be disregarded and stricken.

II. A. The Evidence Does Not Support the Statement That Negotiations Established the Trustees to be Collective Bargaining Representatives. (Brief of Respondent, pp 11-13)

In succeeding sections of the argument, Amax' Brief continues to rely on assertions of fact and law that are unsupported in the record and are not clearly suggested by the question on which certiorari was granted. It is stated that "the Union . . . deferred to the UMW Trust trustees, who rejected Amax's negotiations [sic] proposal." (Brief for Respondent, p. 13). The exhibit in the Joint Appendix at pages 64-66 to which reference is there made do not support the statement. Rather, it appears that the Union's Vice-President, a collective bargaining representative, in Joint Exhibit 1(ggg) clearly rejected the company proposal, after having inquired of the Fund Trustees whether reciprocity with a private pension fund was possible, and being informed by the trustees, acting in their offices as such, that reciprocity was not available.

Contrary to Respondent's argument, the exhibit demonstrates the separate and distinct functions of the bargaining representative, on the one hand, and the trustees, on the other. The self-serving statements in Joint Exhibits 1(kkk) and 1(jjj), also referred to by Respondent, are clearly argument and not fact.

B. THE TRUSTEES' POWERS UNDER THE TRUST AGREEMENTS ARE NOT AN EXTENSION OF COLLECTIVE BARGAINING INTO TRUST ADMINISTRATION. (Brief of Respondent, pp. 13-18.)

Amax has built a large part of its case on *dictum* from *Associated General Contractors of Essex County, Inc. v. Laborers International Union,* 559 A.2d 222 (3d

Cir. 1977) and misrepresentation of the functions of trustees.

The statement quoted from that case on page 14 of Amax' Brief is mischievous *dictum,* unnecessary to the decision, which was that an amendment to a trust to alter the pattern of equal representation of employers and employees was illegal under Section 302(c)(5) of Taft-Hartley. There was no holding that trustees are collective bargaining representatives under §8(b)(1)(B) nor that trustees bound by fiduciary duty to the beneficiaries can also be directed to serve as adversary agents of employees or unions in collective bargaining. The holding of the case on its facts and §302(c)(5) of Taft-Hartley is unexceptionable; the damage of the *dictum* when taken as law is incalculable.

Amax pursues its destructive path through the forest of negotiation, misbranding as collective bargaining and grievance settlement those trust administrative functions which call for fidelity to beneficiaries to the exclusion of subservience to an appointing employer or union.

The subjects of choice of carriers and plans and eligibility of applicants are not those of collective bargaining. §302(c)(5) fixed the method of resolution of deadlocks, not by the standards of bargaining subject to NLRB control, but by compulsory arbitration, a process which Congress rejected for the unfair labor practice sections of Taft-Hartley. Trust administration was recognized by Congress to be just that in §302(c)(5)(B). The trust agreement, not the law of the shop, past practice, or any other consideration of bargaining relationship, must specify the basis upon which fund payments are to be made to beneficiaries.

C. AMAX MISCONSTRUES §302(c)(5) to OUTLAW MULTIEMPLOYER TRUSTEES TO SERVE EXCEPT BY APPOINTMENT OF EACH EMPLOYER. (Brief for Respondent, pp. 19-21)

Amax makes a circular argument around the equal representation requirement of §302(c)(5). If that argument means what it seems to say, it would destroy multiemployer trusts, by imposing a requirement that each employer have its own trustee, thus defeating the equality of representation mandated by §302(c)(5).

But Congress intended §302(c)(5) to apply to multiemployer trusts exactly as it does to single employer trusts. The debates contain unmistakable proof that Senator Taft and his colleagues knew that unions were threatening strike action to require participation in multiemployer benefit plans, but nevertheless did not include in the act any prohibition against strikes with such an objective, although the House bill contained various measures to that end. That legislative history has been carefully analyzed and discussed in the *Amici Curiae* Brief of AFL-CIO, *et al.*, at pages 12 through 17 thereof.

D. A TRUSTEE CANNOT BE SUBJECTED TO DUAL LOYALTIES IN THE ADMINISTRATION OF AN EMPLOYEE BENEFIT TRUST. (Brief for Respondent, pp. 21-29)

Counsel for Amax have devoted many words in support of the untenable proposition that Congress, the NLRB, and the Courts recognize that trustees "wear two hats—one as a collective bargaining representative and one as a fiduciary."

This is inconsistent with what this Court observed, before ERISA, in *Allied Chemical and Alkali Workers of America, Local 1, v. Pittsburgh Plate Glass Company,*

404 U.S. 157, 170 (1971), as to the distinction between trust and agency.

> . . . The union's role in the administration of the [pension] fund is of a far different order from its duties as collective bargaining agent.

The same distinction, in different words, was made in the early decision of the Third Circuit Court of Appeals, in Judge Goodrich's words, in *United Marine Division, I.L.A. v. Essex Transportation Co.*, 216 F.2d 410, 412 (3rd Cir. 1954), holding that Taft-Hartley trustees were not representatives of the employees.

> They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as to any other trustees. The terms under which they act are carefully spelled out.

Amax' counsel persistently ignores this distinction, which Congress later embodied in the fiduciary sections of ERISA. As we noted on our main brief, pages 19 through 23, Congress explicitly drew those provisions to prevent ". . . a fiduciary from being put in a position where he has dual loyalties, and, therefore, cannot act exclusively for the benefit of the plan's participants and beneficiaries." H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. 5089.

Amax' "two hats" contention is plainly wrong.

E. Other Fiduciary Relationships Which May Be Enforceable Against Bargaining Agents Do Not Make Trustees Agents for Unions or Employers. (Brief for Respondent, pp. 29-30)

The Federal labor laws clearly contain many provisions which define and limit the duties, responsibilities and relationships of collective bargaining agents in their agency status, including the provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §501, of which Amax' counsel cites on pages 29 and 30 of Respondent's Brief. They do not say how or why the regulatory scheme of that statute makes Taft-Hartley trustees into bargaining agents.

All the labor laws Congress has adopted are entitled to a reasonable construction to accomplish their manifest purposes. It is not to be presumed that Congress intended conflicting jurisdiction among the various agencies of government having responsibilities in the fields which its enactments have treated in separate regulatory systems, specifically, for this case, labor-management relations and employee benefit trusts.

III. Congressional Purpose and Legislative History Are Misstated by Amax in Its Brief. (Brief for Respondent, pp. 30-39)

Respondents' Brief contains many misstatements of legislative history, in the sections beginning on pages 30 and 32. It is not true that Congress "finalized" §8(b)(1)(B) before §302(c)(5)(B) was "conceived"; the Taft-Hartley Act as finally enacted in 1947 contained both sections, which were the product of extensive study and deliberation.

It is fair to say that the same Congress that adopted that Act gave separate treatment to the prohibtion of strikes to compel employers to join in multiemployer bargaining units, in §8(b)(1)(B), from its treatment of multiemployer benefit trusts in §302(c)(5), by which its overriding purpose was, as its sponsors declared, to see that trusts were administered in the interests of their beneficiaries.

If Congress had wanted to make it a violation of §8(b)(1)(B) to strike to compel participation in a multiemployer benefit trust, it could have, and, we submit, would have done so expressly. It chose not to. The legislative history on the interrelation between §§8(b)(1)(B) and 302(c)(5) is discussed at pages 7 through 17 of the *Amici Curiae* Brief of AFL-CIO, *et al.*

Amax' misstatements of legislative history and purpose spring from a persistent misunderstanding of, and unwillingness to consider, the fundamental distinction which Congress, the NLRB and the courts, from the enactment of the Taft-Hartley Act, through the adoption of ERISA and the 1980 Multiemployer Pension Plan Amendment Act, have recognized between the agency relationship which governs collective bargaining and the trust relationship which controls employee benefit plan administration.

Amax' counsel strains mightily to square the clear language of §§404 and 406 of ERISA with his declaration (Brief for Respondent, p. 32) that "the fiduciary duties contained in ERISA and the common law do not preclude the fiduciary from acting in other capacities . . . ."

Section 404 of ERISA, 29 U.S.C. §1104(a)(1) requires a fiduciary to "discharge his duties with respect

to a plan *solely* in the interests of the participants and beneficiaries—and (a) for the *exclusive* purpose of providing benefits to participants and their beneficiaries." (Emphasis supplied.)

Section 406 of ERISA, 29 U.S.C., §1106(b)(2) declares

> (b) A fiduciary with respect to a plan shall not—
>
> * * *
>
> (2) in his individual or *in any other capacity act* in any transaction involving the Plan *on behalf of a party (or represent a party)* whose interests are adverse to the interests of the Plan or the interests of its participants or beneficiaries, . . . (Emphasis supplied.)

The effort to read out these sections by reference to §408(c)(3), which permits officers, employees, agents or other representatives of parties to serve as trustees, does not succeed. To accept Amax' argument requires a blind eye to the clear requirements of Sections 404 and 406 of ERISA, as well as to the pre-ERISA standards declared by the courts under §302(c)(5) of Taft-Hartley.

In *Curren v. Freitag,* 432 F. Supp. 668 (S.D. Ill. 1977), cited and relied on by Respondent at pages 37-38 of its Brief, the Court recognized the conflict of interest faced by an employer trustee who also represented as agent an employer whose contributions were delinquent, and held that while such a trustee might advise delinquent employers about courses of action they might follow, he should be prevented by the terms of Section 406(b)(2) of ERISA "... from being placed in a position where he was dealing with the Fund on behalf of his employer in a matter concerning the assets of the Fund." 432 F. Supp. at p. 672.

That decision does not mean that a trustee may, as trustee, act as agent for an employer contrary to the interests of the participants and beneficiaries. The most it can be read to mean is that §408(c)(3) of ERISA, 29 U.S.C. §1108(c)(3), permits a trustee of a fund to be an agent of a union or an employee in other contexts.

Again, counsel for Amax blinds his eyes to the limiting language of ERISA and the earlier cases, in arguing for the right to wear two hats in trust administration.

CONCLUSION

The basic distinction between agency and trust must be ignored if Amax' argument is to be accepted. The legislative purpose and history must be read through special glasses which obliterate or blur the careful distinctions which Congress, the NLRB and the Courts have until now recognized in the complex fields of labor-management relations and employee benefit trust regulations, if Amax' analysis is believed. The arguments are mistaken. The judgment of the Court of Appeals should be reversed.

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Nos. 80-289 and 80-692

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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

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UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

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AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Virtually all of the arguments advanced by Amax Coal Company rest on one or more of the following misconceptions: (1) if a company is obligated to bargain with a union over a contract term proposed

by the union, the company must eventually accept that term; (2) because a person who represents an employer or union for purposes of collective bargaining may also serve as a welfare or pension fund trustee, the trustees of such funds may, when administering the trust, advance the interests of the parties that appoint them; and (3) in practice if not in theory, welfare and pension fund trustees engage in ongoing collective bargaining. We address these misconceptions seriatim.

1. Amax repeatedly asserts that were this Court to reverse the Third Circuit and uphold the Board's order insofar as it relates to bargaining over multiemployer welfare and pension funds, Amax would be "forced" and "compelled" (Br. i, 6, 4 n.2) to contribute to multiemployer funds even though it "had proposed [single employer] retirement and health and welfare programs which offered its employees better benefits than those provided by the Union plans" (Br. 3; see also *id.* at 4 n.2, 5, 6 n.3, 12, 13 and 43). As we observed in our opening brief (at 17 n.9), even if a union bargains to impasse on this issue, an employer can place its own proposal on the table and refuse to accede to the union's demand—a right Amax effectively exercised in this case.[1]

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[1] Although we express no opinion on the relative merits of the Union's and the Company's welfare and pension proposals, we note that the concern expressed by Amax (Br. 4 n.2) that multiemployer funds subject employees in one bargaining unit to "short fall[s] in funding caused by * * * 'wildcat' strikes" in another is at least counterbalanced by the fact that multiemployer funds "have an added element of financial strength in that their contributions come from a number of employers who as a group are less likely than comparable single employers to experience business difficulties." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 25 (1974). Moreover,

The perception that Amax had no choice but to accept the terms dictated by the Union is reinforced by Amax's insistence (Br. 3, 4 n.2, 5, 15, 17-18) that the Union's "multiemployer trust funds [were] developed and controlled by an entirely different collective bargaining agreement" (*id.* at 3) entered into between the Union and the Bituminous Coal Operators Association ("the BCOA"), and that because Amax did not wish to be a signatory to the BCOA agreement in connection with the Belle Ayre mine, it was not in a position to negotiate changes in the pension and welfare plans set out in that agreement. This repeated linkage of the multiemployer trust funds with the BCOA agreement fosters the impression that in pressing Amax to participate in the funds, the Union was trying by indirection to do that which it was prohibited from doing directly—force Amax into the BCOA. That is simply not the case. It is clear from the record that the Union did *not* want the Company to be covered by the BCOA agreement (Pet. App. 3a) and instead negotiated for

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should a union insist on a health or retirement plan that works to the relative disadvantage of its members, the members are not without recourse, including decertifying the union or, under this Union's procedures, rejecting the contract. We also note that under Amax's proposed pension plan (which, because it would be established by an employer rather than by a union, would not be governed by Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c)(5), the single trustee would be appointed by Amax and would serve at the Company's pleasure. Similarly, the administrator of the plan would be appointed and removable solely by Amax (A. 283-297). Among the Union's stated reasons for rejecting the plan was its desire "to participate in the administration of the retirement program so as to be assured that the pension fund would be administered in the best interests of the employees * * *" (Pet. App. 119a).

a separate contract in which the general terms and conditions of its welfare and pension plans would be set out.[2]

Thus, for example, Article XX of the proposed contract between the Union and the Belle Ayre mine (A. 98e-98x) summarizes the principal health and retirement benefits provided by the Union's multiemployer trusts (A. 98r-98x), sets out a scheme for contributions by Amax into the various trusts (A. 98h-98i), defines certain terms, fixes the responsibilities and duties of trustees (A. 98n-98o), provides for the administration of the trust (A. 98p-98r), and provides for audits, reports and notices (A. 98o-98p). It is apparent that, for the multiemployer funds to be workable, certain of these terms (*e.g.*, the provisions relating to the administration of the trusts, the responsibilities and duties of the trustees and, most pertinent here, the identity of the trust-

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[2] Thus, Amax's assertion (Br. 4) that throughout their negotiations "the Union was bargaining under protest and continued to claim Amax was bound by the [BCOA] Agreement" is incorrect. At the outset of the negotiations the Union proposed that Amax and other western mining companies form a multiemployer bargaining group other than the BCOA and offered to extend for 60 days the contract of each employer that did so. Four employers formed such an association, referred to throughout this proceeding as the Peabody Group. Amax later considered joining the Group but eventually decided no to. On December 20, 1974, the Union began negotiations with the Peabody Group and, on January 7 and 8, 1975, informed Amax that it considered the Company to be part of the Group. On February 3, 1975, after being notified that the General Counsel of the National Labor Relations Board intended to issue a complaint and seek an injunction against it for refusing to bargain with Amax, the Union began independent negotiations with Amax over an independent contract (Pet. App. 3a-4a, 46a-51a, 80a-93a).

ees), like the underlying trust agreements themselves, were not subject to separate negotiation with Amax or with any of the other 2,000 participating employers.[3] It is equally apparent, however, that Amax was free to bargain over the terms of the contract governing the amount of money it would contribute into the trusts.[4]

2. Amax argues at length (Resp. Br. 32-42) that neither the Employee Retirement Income Security Act of 1974 (ERISA), nor the common law precludes trustees from also serving as employees, officers, agents, or collective bargaining representatives of the settlors of the trust. We agree. Indeed, as we acknowledged in our opening brief (at 30 n.29), Section 408(c)(3) of ERISA, 29 U.S.C. 1108(c)(3), expressly permits such dual service. Thus, it is true, to borrow Amax's metaphor (Br. 25, 29, 34), that trustees may wear two hats. It does not follow, however, that they may wear both hats at the same time.

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[3] Contrary to Amax's assertion (Br. 4) that "the Union and BCOA were negotiating *new trustee agreements*" while the contract talks between the Union and Amax were pending, the Union and the BCOA settled their differences in December 1974, two months before the negotiations with Amax commenced (Pet. App. 86a). Thus, "[t]he Funds were already established when the [Union] first proposed that Amax contribute to them * * *" (Pet. App. 137a).

[4] Indeed, in the Union's proposal the rates at which Amax would contribute (expressed in terms of cents per ton of coal mined and cents per hour worked) were not fixed (A. 98h-98i). Moreover, Amax's ability to bargain about the contract provision governing the pension and welfare funds is demonstrated by the fact that the Union agreed to delete the requirement that Amax contribute to the 1950 Trusts (in addition to the 1974 Trusts) upon being informed by the Company that none of its Belle Ayre employees had participated in or were beneficiaries of the earlier funds.

Quite to the contrary, a trustee who also serves as, for example, a union's business agent must doff that hat while making discretionary decisions on behalf of the trust and engaging in its administration. As the Eighth Circuit put it in *NLRB* v. *Construction & General Laborers' Union Local 1140*, 577 F.2d 16, 20 n.6 (1978), cert. denied, 439 U.S. 1070 (1979), Section 408(c)(3) provides that such a trustee may "be the agent of the union *in other contexts*" and may discharge his different roles in separate spheres.[5]

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[5] Throughout its brief, Amax confuses the "dual role" that trustees may play as both trustees and collective bargaining representatives (so long as the functions are not performed simultaneously or in a context or manner that results in divided loyalties) and the dual role they must play as both trustees and "representatives" of the employer or the union as that term is used in Section 302(c)(5)(B). Compare Resp. Br. 21, 29, 38 with *id.* at 27, 42. As we explain in our opening brief (at 23-29), in requiring that there be a balance between trustees appointed by the employer (or employers) and trustees appointed by the union, Section 302(c)(5)(B) was "designed not to alter, but to reinforce 'the most fundamental duty owed by the trustees': the duty of undivided loyalty to the beneficiaries." *Blankenship* v. *Boyle*, 329 F. Supp. 1089, 1095 (D. D.C. 1971), aff'd mem., 511 F.2d 447 (D.C. Cir. 1975). The employer "representatives" were intended to serve as a negative check on the kinds of real and perceived union misuse of pension and welfare funds that led to the enactment of the statute. As Amax correctly observes, employer representatives were meant to serve as "watchdogs." ERISA takes this one step further and places an affirmative duty on *all* trustees to prevent every other trustee of the same fund from breaching his or her fiduciary duties, including the duty to act solely on behalf of trust beneficiaries. 29 U.S.C. 1105(a). Nothing in either statute suggests, however, that while preventing his colleagues from advancing the interests of one party to a collective bargaining agreement a trustee is free to advance the interests of the

3. Amax contends (Br. 12-13, 15-18, 25-26) that the trustees' fiduciary duties apply only to the routine daily administration of the trust, and that the trustees are expected to "bargain" in the interest of their appointing parties in exercising their nonroutine functions under the trust agreement. However, neither ERISA nor the trust instrument at issue in this case permits any such distinction. Section 404 (a) (1) of ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," and provides for no exceptions. Indeed, it is the very discretionary authority that Amax would exempt from fiduciary obligations which makes the trustees fiduciaries under ERISA. See 29 U.S.C. 1002(21) (A). Similarly, Article VI(14) of the trust instrument requires the trustees, without exception, "to exercise any and all powers of the Trustees under this instrument" in the manner they "deem to be for the best interest of the Trust" (A. 277). Accordingly, both the statute and the trust instrument require the trustees to exercise *all* of their discretionary powers solely in the interest of the trust and its participants and beneficiaries, and not, as collective bargaining representatives must, in the interest of the Union or the employers who appointed them. See *Toensing* v. *Brown*, 528 F.2d 69, 71-72 (9th Cir. 1975) (increasing pension benefits constitutes fund administration subject to fiduciary duties).[6]

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other. That result, despite Amax's vigorous advocacy of it, would be self-contradictory and contrary to the manifest intent of Congress.

[6] Contrary to Amax's suggestion (Br. 25-26), the distinction drawn by the courts between "structural" deficiencies in a trust which run afoul of Section 302(c) (5) on the one

Moreover, contrary to Amax's assertion (Br. 12), the fund trustees have no authority to "bind [Amax] to collective bargaining agreement changes." Such changes would not be theirs to make. The contribution rates for coal mined byAmax would be specified in Article XX, Section (c) of the Union's contract proposal (A. 98g-98i), and Article XX, Section (d) would preclude increasing Amax's total contribution during the term of the contract (A. 98k). The trustees would be delegated responsibility for setting contribution rates only for salvaged coal refuse (A. 98k-98*l*). In enforcing an employer's contractual obligation to contribute to the funds, the trustees would have no power to require an employer to make contributions to which he had not agreed in collective bargaining.

> [The trustees'] right to recover contributions from the mine operator is dependent entirely upon the real agreement between the operator and the union. The trustees have no independent right to insist that an operator make any contribution to the fund, or that it do so on the same basis and under the same formula that other operators contribute. The trustees are the third party beneficiaries of the real agreement between the union and operator, which they may enforce in accordance with its terms * * *.

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hand, and the day-to-day administration of a fund on the other, has nothing to do with limiting the reach of the trustees' fiduciary duties. This distinction relates to federal court jurisdiction under Section 302(e), 29 U.S.C. 186(e), which most courts now recognize as limited to correcting violations of the specific requirements set out in Section 302(c)(5) and as not including broad equitable powers to regulate trust administration. See generally *Souza* v. *Trustees of the Western Conference of Teamsters Pension Trust*, 460 F. Supp. 843, 844-846 (N.D. Cal. 1978), and cases there cited.

Lewis v. *Lowry*, 295 F.2d 197, 199 (4th Cir. 1961), cert. denied, 368 U.S. 977 (1962). Similarly, contrary to Amax's assertions (Br. 12-13, 15-16), the trustees could not require Amax to contribute to the funds for coal produced on leased lands or purchased from non-union employers unless Amax had itself agreed to make such contributions in its collective bargaining contract with the Union.[7] Furthermore, as shown in our opening brief (at 37-38), Amax has incorrectly characterized the trustees' authority to determine eligibility for benefits and resolve beneficiaries' claims against the fund as (Resp. Br. 17) "the collective bargaining process of adjusting grievances"; such disputes are between the independent fund and its beneficiaries and are not labor disputes between employees and employers.

The trustees' authority to amend the trust is similarly circumscribed. Thus, Article XX, Section (h)(5) of the Union's contract proposal (A. 98q) permits the trustees "to amend [the trust] unilaterally only to ensure compliance with applicable federal laws." *Robinson* v. *United Mine Workers of America Health and Retirement Funds*, 640 F.2d 416 (D.C. Cir. 1981). Other amendments to the trust may be made only by the Union and the employers, or with their approval. As with the resolution of benefit claims, however, such amendments would involve matters between the fund and the beneficiaries and not matters between employees and

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[7] Thus, the reason the trustees would be unable to collect contributions from Amax for the 1950 pension fund (Br. 16) is because the Union eliminated this provision from its contract proposal when it learned that none of the Belle Ayre employees would benefit from that fund (Pet. App. 105a-106a). See also note 4, *supra*.

employers. As noted above, Amax's obligation to contribute to the trust could not be altered by the trustees, and should the Union agree to a change in the types of benefits Amax's employees receive from the fund, it might well thereby violate Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158 (b)(3). *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-188 (1971); *Warehousemen's Union Local 334 (The Crescent)*, 253 N.L.R.B. No. 109 (Jan. 8, 1981) (amendment of trust to provide new benefits which were rejected in collective bargaining with independent employer violated Section 8(b)(3)).[8]

Finally, contrary to Amax's repeated assertion (Br. 5-6, 13, 31-32, 45), the multiemployer fund trustees did not participate in the Union's collective bargaining with Amax. When Amax proposed that the Union's concern about the lack of portability of benefit credits of a single-employer retirement plan could be resolved by means of a reciprocity agreement

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[8] In *The Crescent*, the Board refused to permit the union to avoid responsibility under Section 8(b)(3) for unilateral changes in available benefits merely by delegating to the trustees the authority to amend the trust. Cf. *National Union of Hospital and Health Care Employees (Sinai Hospital)*, 248 N.L.R.B. 631 (1980), application for enforcement pending (4th Cir. No. 80-1499). Neither *The Crescent*, nor any of the other Board cases cited (at 22) on Amax's brief, involved any sort of "bargaining" between union trustees and employer trustees. Rather, as noted in our opening brief (at 42 n.29), the Board in these cases treated the entire board of trustees of a fund as an agent of both collective bargaining parties for certain limited purposes. Amax has pointed to no case in which the Board has ever purported to regulate the relationship between employer-appointed trustees and union-appointed trustees in the internal administration of the trust, which would be the result if, as the court of appeals found, the trustees bargain collectively with each other. *Id.* at 41-42.

between Amax's separate pension plan and the Union's national fund, the Union inquired of the fund trustees whether this would be possible under the terms of the trust. The trustees responded that they had no authority to alter the fund to provide for reciprocity with Amax's plan, and the Union then informed Amax that, because of the trustees' ruling, its "strongly held views on the advantages of portability" could not be accommodated with Amax's proposal (A. 64-66). Thus, the fund trustees merely informed the Union that because of limitations in the terms of the trust, if the Union agreed to Amax's proposal there would be no reciprocity; they did not participate in the Union's decision to reject Amax's proposal for a separate plan.[9]

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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APRIL 1981

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[9] Moreover, since the employer-appointed trustee participated in the decision not to grant reciprocity, Amax's argument would make him a collective bargaining representative of the Union, along with the union-appointed trustee, a result that is contrary to Amax's position in this case that the employer-appointed trustee is a collective bargaining representative of the employers under Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B).

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AFL-CIO, SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AND NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, AS AMICI CURIAE

March 5, 1981

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QUESTION PRESENTED

Are trustees of a multi-employer pension and welfare trust fund established pursuant to § 302(c)(5) of the Labor Management Relations Act of 1947 "representatives for the purposes of collective bargaining or the adjustment of grievances" within the meaning of § 8(b)(1)(B) of the National Labor Relations Act?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-289 and 80-692

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
AND UNITED MINE WORKERS OF AMERICA,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD AND
AMAX COAL COMPANY, A DIVISION OF AMAX, INC.
Respondents

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AFL-CIO, SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AND NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, AS AMICI CURIAE

INTEREST OF AMICI CURIAE *

Amicus curiae American Federation of Labor and Congress of Industrial Organizations is a federation of 104 national and international unions with a total membership of 13,500,000 working men and women.

Amicus curiae Sheet Metal Workers' International Association ("SMWIA") is an international union affiliated with the AFL-CIO.

Amicus curiae Sheet Metal and Air Conditioning Contractors' National Association ("SMACNA") is a trade association of sheet metal and air conditioning contractors in the United States and Canada, with approximately 2600 member contractors in the United States.

The memberships of each of these *amici* contribute to and/or participate in a number of multi-employer trust funds established and operated pursuant to § 302(c) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c), that offer substantial benefits to the fund participants and beneficiaries. Each *amicus* recognizes that multi-employer trust funds offer a unique vehicle for funding and providing employee benefits in a stable and efficient manner.

Amicus curiae National Stabilization Agreement of the Sheet Metal Industry Trust Fund ("SASMI") is a § 302(c) multi-employer trust fund created in 1973 in accordance with collective bargaining agreements between local member unions of SMWIA and various sheet metal contractors. SASMI is a separate entity, organized and administered independently of SMWIA, the local unions, and the local employers. The fund is operated for the sole and exclusive benefit of its participants and beneficiaries.**

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* Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters of consent have been filed with the Clerk of the Court.

** The administration of SASMI and its status as a subject of collective bargaining was recently put in issue when an association

The issue presented in this case concerns the administration—indeed the very existence—of § 302(c) multi-employer trust funds and their role in the collective bargaining process. Each *amicus* has a vital interest in these matters.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a single issue of statutory construction: whether a union is forbidden from striking to obtain employer contributions to and other participation in a multi-employer trust fund, jointly administered by the union and the participating employers.

The Court of Appeals for the Third Circuit held that a trustee designated by an employer or group of employers to participate in administration of a pension or welfare trust fund under § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), the provision governing the form and administration of such funds, is a representative "for the purposes of collective

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of employers filed unfair labor practice charges against amicus curiae SMWIA and the SMWIA's local union with which the employer association had signed a collective bargaining agreement, contending that these parties had violated § 8 of the National Labor Relations Act, 29 U.S.C. § 158, by insisting on SASMI and striking to ensure that the employers would include SASMI participation as one of the benefits of the contract. On review of those charges, the National Labor Relations Board rejected the very contention accepted by the Third Circuit in this case, and ruled that trustees of a multi-employer trust fund are not representatives for purposes of collective bargaining. The Board further held that SASMI's trustee designation clause—the provision that requires entering employers to accept the existing employer-appointed trustees until their successors are chosen in accordance with the SASMI Trust Agreement—is a mandatory subject of bargaining. Sheet Metal Workers' International Association, 234 N.L.R.B. 1238, 97 L.R.R.M. 1476 (1978). The Board's decision is currently under review by the United States Court of Appeals for the Fifth Circuit. Central Florida Sheet Metal Contractors Ass'n v. NLRB, No. 79-2396 (5th Cir. 1979).

bargaining" within the meaning of § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B). On that basis the Third Circuit concluded that the union's strike to obtain Amax's agreement to participate in the fund was in violation of that provision because it coerced Amax "in the selection of [its] representatives for the purposes of collective bargaining."

The facts on which this decision is based make it clear that the necessary effect of the court of appeals' construction of § 8(b)(1)(B) is to prohibit *any* union strike in support of a demand for employer contribution to and participation in a multi-employer pension fund. Amax's objection was not that Amax would have no voice in the selection of the employer trustee in the multi-employer fund. Having participated in the fund prior to the negotiations at issue here, Amax had taken part in that selection. Rather, Amax's complaint was that, as one employer participant in the fund, it could not have *complete* control over the selection of the employer trustee.

Because it is impossible, by definition, for every employer participating in a multi-employer fund to have sole control over selection of the employer trustees, the decision below would always forbid a union strike in support of a demand that an employer provide pension or health benefits for his employees through a multi-employer trust fund rather than through a plan applicable only to that one employer.[1] That result, and the supporting

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[1] Pension and health benefits are not the only subjects affected by this ruling. Section 302(c)(5) applies to trust funds established for any of the following purposes: medical and hospital care, pensions on retirement or death, compensation (or insurance) for occupational disease or injury, disability and sickness insurance, or accident insurance, § 302(c)(5); "pooled vacation, holiday, severance or similar benefits" or to defray costs of apprenticeship or other training programs, § 302(c)(6); and group legal services, § 302(c)(8).

Section 302(c)(5) also prescribes the form and administration of funds that provide educational scholarships for employees and their families and child care centers for employees' dependents, § 302(c)(7), but with respect to funds for those purposes—unlike

decision of the Third Circuit, are contrary to the meaning and purpose of the statutes upon which the lower court's decision purports to rest.

In Part I we examine the legislative history of the Taft-Hartley Act, by which both § 8(b)(1)(B) and § 302(c)(5) were enacted into law. We show first that the concerns that Congress addressed in § 8(b)(1)(B) have no relation to an employer's participation in the administration of a multi-employer welfare fund under § 302(c)(5). Then we focus on three aspects of the legislative debate on Taft-Hartley which together demonstrate both that the problem addressed in § 8(b)(1)(B) is wholly distinct from that addressed in § 302(c)(5), and that Congress intended to deal with these two problems by separate solutions.

First, the legislative history of § 302(c) shows that the 1947 Congress did not intend to prohibit unions from bargaining for, and striking to obtain, employer participation in such multi-employer funds. That history shows that the dominant event that prompted the drive for legislation on this subject was a strike the previous year in the coal industry, in support of, among other demands, contribution from all mine operators to a United Mine Workers welfare fund. That strike and the demand for that fund were a focus of the debate in Congress, as both houses considered a variety of proposals for legislation concerning union benefit funds and multi-employer bargaining. When the debate was over and the votes were in, Congress had imposed certain limitations on the *form* and *use* of welfare funds by means of § 302(c)(5), but the sponsors of the legislation repeatedly asserted that they had taken no other action with respect to welfare funds. The sponsors plainly did not believe that they had limited the Mine Workers' right to bargain or strike

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funds for pensions, health benefits and the other subjects covered by § 302(c)(5), the Act expressly provides that neither the unions nor the employer is required to bargain about the establishment of such a fund, § 302(c)(7).

over the 1946 demand in the future, as long as the fund complied with § 302(c)(5).

Second, the legislative history shows that Congress did not regard the functions performed by the trustees who administer a § 302(c)(5) trust to be collective bargaining or grievance adjustment within the meaning of § 8(b)(1)(B). The statutory definition describes a process entirely different from that engaged in by trustees. The most important difference is that Congress took pains in Taft-Hartley to ensure that nothing in the Act would alter the fundamental principle of free collective bargaining and grievance adjustment—that the law does not require the union and employer to reach agreement, and when they reach an impasse they are entitled to resort to their respective econmic weapons. By sharp contrast, in § 302(c)(5) Congress provided a mechanism for *compulsory* arbitration of questions of trust administration on which the union trustees and employer trustees reach a deadlock.

Third, Congress provided in § 302(c)(5) that the fund must take the form of a trust, invoking the common-law principles that define the fiduciary obligations of a trustee. Those principles, subsequently articulated as federal statutory law in the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), require that each trustee's sole responsibility is to act in the interest of the employees who are participants and beneficiaries of the fund. A trustee cannot at the same time be a fiduciary, with sole loyalty to the employee participants and beneficiaries, and serve as the collective bargaining agent of the party that appointed him, with the loyalty to that party that such a role demands.

In Part II we show that the result of the court of appeals' decision in this case is contrary to the policy of Congress to encourage the development of multi-employer benefit trusts. Such trusts provide greater stability and security than single-employer trusts, and Congress

has acted to protect them in ERISA and again last year in the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208. The court of appeals' decision will make it impossible for unions to bargain effectively to establish or maintain employer participation in multiemployer funds, and will therefore frustrate the intent of Congress, not only in the Taft-Hartley Act but in these subsequent enactments.

ARGUMENT

I. TRUSTEES WHO ADMINISTER SECTION 302(c) FUNDS ARE NOT "REPRESENTATIVES FOR THE PURPOSES OF COLLECTIVE BARGAINING OR THE ADJUSTMENT OF GRIEVANCES" WITHIN THE MEANING OF SECTION 8(b)(1)(B), AND ARE FIDUCIARIES WHOSE SOLE RESPONSIBILITY IS TO THE EMPLOYEES WHO ARE PARTICIPANTS AND BENEFICIARIES OF THE FUNDS.

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B). As this Court has recognized, Congress had a narrow purpose in enacting § 8(b)(1)(B):

> Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances.

Florida Power & Light Co. v. *IBEW*, 417 U.S. 790, 803 (1974).[2] The Senate committee report on the bill that

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[2] In *American Broadcasting Co.* v. *Writers Guild*, 437 U.S. 411 (1978), the Court distinguished *Florida Power & Light*, and held that the NLRB was entitled to conclude that the union there had violated § 8(b)(1)(B) by the nature of the discipline it had imposed on supervisors. The *Writers Guild* case did not disapprove

was eventually enacted as the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley") explained the intended effect of § 8(b)(1)(B) as follows:

> This [section] proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purpose of collective bargaiinng or the adjustment of grievances. Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

S. Rep. No. 105, 80th Cong., 1st Sess. 21 (1947), 1 Leg. Hist. 427 (hereinafter "Senate Report").[3]

As the bill made its way through the Senate, its proponents repeatedly explained the concerns that prompted § 8(b)(1)(B) in narrow terms. One of those concerns, plainly inapplicable here, was to prevent unions from striking to force an employer to get rid of a supervisor who was strict with those he supervised, and to prevent unions from striking to force an employer to take a particular individual off, or put a particular individual on,

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any of *Florida Power & Light*'s discussion of the legislative history of the limited purposes of § 8(b)(1)(B); the basis of the decision was rather that the NLRB had acted within the scope of its discretion in applying § 8(b)(1)(B), and that its order was therefore entitled to judicial approval. See particularly *id.* at 430-431.

[3] The legislative history of the Taft-Hartley Act is reproduced in two bound volumes published by the National Labor Relations Board, entitled Legislative History of the Labor Management Relations Act 1947, and cited throughout this Brief as "Leg. Hist." For ease of reference, we have cited all references to House and Senate debates to this source.

its bargaining team. *See* 2 Leg. Hist. 1012 (Sen. Taft); 2 Leg. Hist. 1077 (Sen. Ellender).

The second concern was to "prevent unions from trying to force employers into or out of multi-employer bargaining units." *Florida Power & Light, supra*, 417 U.S. at 803. The question of multi-employer bargaining was one of the major issues that dominated the legislative proceedings in the House and the Senate. *See NLRB* v. *Drivers Local 449*, 353 U.S. 87, 94-96 (1957). The extensive debates on that issue demonstrate that § 8(b)(1)(B)'s prohibition of strikes to compel employers to join in multi-employer bargaining was the product of: (1) the perceived concentration of power in large national unions that enabled their leaders to call strikes affecting substantial segments of the nation's economy, and (2) the perceived danger that multi-employer bargaining gave large unions "monopoly power" over wages.[4]

In rejecting proposals to limit multi-employer bargaining, the majority of the Senate made the judgment that these perceived dangers could be adequately guarded against by leaving the formation of multi-employer bargaining arrangements to employer discretion.[5] To ensure

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[4] Senate Report 51, 1 Leg. Hist. 457; 2 Leg. Hist. 1240, 1246-1248 (Sen. Taft); *id.* 1059 (Sen. Ball).

For examples of similar statements in the House, see H.R. Rep. No. 245, 80th Cong., 1st Sess. at 8-9 (1977) (hereinafter "House Report"), 1 Leg. Hist. 299-300; 1 Leg. Hist. 612, 784 (Rep. Hartley); *id.* 673-674 (Rep. Fisher); *id.* 635-636 (Rep. Schwabe).

[5] One of the major concerns expressed by the opponents of the amendments proposed by Senators Taft and Ball to limit multi-employer bargaining was that they would restrict multi-employer bargaining even where employers had made that choice for their own benefit. See, e.g., Senate Minority Report No. 105, 80th Cong., 1st Sess. at 6-8 (1947) (hereinafter "Senate Minority Report"), 1 Leg. Hist. 468-469; 2 Leg. Hist. 1231-1234 (Sen. Kilgore); *id.* 1245-1246, 1273, 1281 (Sen. Ives); *id.* 1286, 1290-1291, 1297-1298 (Sen. Morse).

In the course of the debates, opponents of the amendments repeatedly emphasized that the bill as reported—with § 8(b)(1)(B),

that this decision would be a product of the employer's own evaluation of his interests, the bill prohibited unions from using strikes or other economic coercion to force an employer into a multi-employer bargaining unit.

The perceived dangers that led to § 8(b)(1)(B) do not counsel a like prohibition of union bargaining for employer contributions to or participation in a jointly administered fund established pursuant to § 302(c)(5). Congress expressly provided, as we show at pages 16, 19, *infra*, that the rights of employees in such trust funds must be defined in advance, thus precluding "bargaining" among the trustees on that subject. Congress further provided in § 302(c)(5)(B) that disputes between the employer and employee trustees could not lead to strikes or other exercises of economic power, but must be resolved by a neutral umpire. An association of various trustees, acting together for joint administration of a trust fund, therefore, can lead neither to a grant of "monopoly power" to a union in fixing wages nor to broad disruption of the economy through concerted strike action against a large group of employers. And three aspects of the legislative debate demonstrate that the 1947 Congress considered the problem addressed in § 8(b)(1)(B) to be wholly distinct from that addressed in § 302(c)(5), and also that Congress formulated separate and independent solutions for those problems.

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§ 8(b)(3) (making it an unfair labor practice for a union to refuse to bargain in good faith), and the NLRB's practice of creating a multi-employer bargaining unit only where employers voluntarily associated themselves for bargaining—would assure that multi-employer bargaining would occur only where both employers and unions desired such bargaining. See 2 Leg. Hist. 1244 (exchange between Sen. Ellender and Sen. Taft); *id.* 1233 (Sen. Kilgore). The proponents of the amendments agreed that the committee bill would have that effect. *Id.* 1219-1220 (Sen. Ball); *id.* 1241 (Sen. Taft).

A further discussion of the legislative history on the issue of multi-employer bargaining appears at pages 13-15, *infra*. *See also Florida Power & Light*, *supra*, 417 U.S. at 803 n.14.

First, the legislative history of § 302(c) shows that Congress did not intend in 1947 to prohibit strikes in support of union demands for employer participation in such multi-employer funds.

One of the events that shaped the legislative effort culminating in the Taft-Hartley Act was the demand by John L. Lewis in 1946, as a condition for settling an industry-wide coal strike, that all mining operations contribute 10 cents per ton into a central "welfare fund" to be administered exclusively by the United Mine Workers. *See United States* v. *Ryan*, 350 U.S. 299, 304-305 (1956).[6] The federal administrator who was then operating the mines pursuant to the War Labor Disputes Act agreed to a five-cent contribution to the UMW fund. John L. Lewis then gave notice that on July 1, 1947, when the Government's authority to operate the mines expired, he would again demand a ten-cent contribution from the mine operators into the UMW fund.[7]

The fear of another industry-wide coal strike, and concern about possible misuse of the contributions to the unrestricted UMW "welfare fund," became a focus of the legislative effort. The 79th Congress had passed a bill that would have dealt partially with these fears, but President Truman had exercised his veto and its supporters could not muster enough votes to override that veto. *See Arroyo* v. *United States*, 359 U.S. 419, 425 n. 6 (1959). In April 1947, when the 80th Congress began debate on amendments to the National Labor Relations Act, one of the recurring questions was what the legislature should do about the UMW demand.[8]

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[6] *See also* Senate Report, at 52, 1 Leg. Hist. 458; 1 Leg. Hist. 753 (Rep. Case); 2 Leg. Hist. 1305 (Sen. Byrd); *id.* 1310 (Sen. Taft).

[7] *See United States* v. *United Mine Workers*, 330 U.S. 258, 262 n. 1, 286 (1947); Senate Report 41, 1 Leg. Hist. 420; 1 Leg. Hist. 612 (Rep. Hartley); *id.* 754-755 (Rep. Fisher).

[8] The debates on both of these subjects are full of references to John L. Lewis and the Mine Workers. For examples, in the debates

The House passed a bill that contained three major provisions that would have prevented the UMW, by different means, from renewing its industry-wide demand for employer contributions to a welfare fund. One of those provisions would have prohibited multi-employer bargaining;[9] another would have excluded "welfare arrangements" from the subjects on which employers were required to bargain;[10] and a third would have prohibited employer contributions into any trust administered even partly by a union.[11]

The Senate, though likewise troubled by the UMW's bargaining demands,[12] would have none of the House's prohibitions on multi-employer bargaining and bargaining over welfare plans. The bill reported by the Senate

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on industry-wide bargaining, *see* 1 Leg. Hist. 612 (Rep. Hartley); *id.* 672-673 (Rep. Fisher: "Do we or do we not want to curb the power of John L. Lewis and his kind over the economic life of the Nation?"); 2 Leg. Hist. 1222, 1227 (Sen. Ball). Examples of references in the debates on union welfare plans are cited in note 5, *supra*. *See also* 1 Leg. Hist. 751 (Rep. Hartley); *id.* 754-755 (Reps. Fisher and Fernandez).

[9] Section 9(f)(1) would have prohibited any union from representing the employees of more than one employer (except for those in small plants located close together), and sections 2(16) and 12(a)(3)(A) would have prohibited unions representing different employers in the same industry from striking in support of concerted demands. H.R. 3020, §§ 2(16), 9(f)(1), 12(a)(3)(A), 1 Leg. Hist. 169-170, 187-188, 205; House Report, 8-9, 24, 35-36, 43-44, 1 Leg. Hist. 299-300, 315, 326-327, 334-335.

[10] H.R. 3020, § 2(11), 1 Leg. Hist. 163-167; House Report, 19-23, 31; 1 Leg. Hist. 310-314, 322.

[11] H.R. 3020 § 8(a)(2)(C)(ii), 1 Leg. Hist. 177-178; House Report 28-29; 1 Leg. Hist. 319-320.

A fourth provision in the House bill would have prohibited unions from compelling their members to participate in any insurance or benefit plans, apparently requiring the consent of each individual employee, so that group welfare arrangements could not even be financed through union dues. H.R. 3020 § 8(c)(3), 1 Leg. Hist. 180; House Report 30-31, 1 Leg. Hist. 321-322.

[12] See notes 6 and 8, *supra*.

Committee on Labor and Public Welfare defined mandatory subjects of bargaining broadly enough to include pensions, insurance and similar benefits, thereby maintaining union freedom to bargain and strike for employer contributions dedicated to these purposes.[13] And the Senate Committee bill contained no restriction on the establishment and administration of pensions or other "welfare" funds, and no restriction on multi-employer bargaining other than § 8(b)(1)(B), discussed above.[14]

Senators Ball and Taft did introduce a floor amendment to restrict multi-employer bargaining, which was debated at length over a period of three days.[15] Even that amendment would not have prohibited multi-employer bargaining entirely, as the House bill did, but would have allowed such bargaining only so long as it was voluntary on the part of every employer and every local union whose members were affected.[16] Nonetheless, the amendment was highly controversial, and was defeated by one vote.[17]

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[13] The Senate Minority Report, in explaining the vote of the Committee to reject the provision that became § 302(c)(5), stated:.

> In discarding these sections it was recognized that welfare funds of all varieties are proper subjects for free collective bargaining and that any fetters placed upon their normal development through voluntary and independent or cooperative action of management and labor are completely unjustified.

Senate Minority Report 23, 1 Leg. Hist. 485. *See* Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). *See also* Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 180 (1971).

[14] Senate Report at 2, 51-52, 1 Leg. Hist. 408, 457-458; Senate Minority Report at 6, 23, 1 Leg. Hist. at 468, 485; 2 Leg. Hist. 1012 (Sen. Taft).

[15] Senate Report 51-52; 1 Leg. Hist. 457-458; 2 Leg. Hist. 1217-1302.

[16] Senate Report 51, 1 Leg. Hist. 457; 2 Leg. Hist. 1300 (Sen. Taft).

[17] 2 Leg. Hist. 1302. After the vote, the prevailing side offered to allow a vote to reconsider. Senator Taft declined that offer, explaining:

> My feeling is that inasmuch as the division is so close and inasmuch as so many Senators feel strongly on one side of the

Immediately after that vote, the amendment that became § 302 was introduced on the floor of the Senate.[18] In the course of the debates, Senators Taft and Ball, the sponsors of the amendment made it plain that they knew of the existence of multi-employer welfare funds, and that they understood that unions were free to strike in support of demands for employer participation in welfare funds. In addition to the obvious example of the UMW fund,[19] there were references to other multi-employer funds maintained by unions or currently the subject of union bargaining demands.[20] Senator Taft's remarks reflected his understanding that unions had a right to bargain for such funds and to use economic weapons to force employers to participate in them:

> This amendment is, in effect, a provision to prevent the abuse of *the right to establish such funds by collective bargaining*, pending further study of the whole problem. . . . [*I*]*f such an agreement is forced upon an employer*, in effect we make the officials of the union who collect the tax Government agents for collecting and distributing the tax.

2 Leg. Hist. 1313 (emphasis added).

Although Senators Taft and Ball were thus aware that unions could strike in support of demands that employers participate in multi-employer welfare funds, the measure they proposed on this subject did not incorporate any of the various measures in the House bill that would have

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amendment, even if it were carried by one or two votes, it probably would not advance the progress of the bill, and it might lose votes for the bill.

2 Leg. Hist. 1309.

[18] *Id.* 1302.

[19] *Id.* 1312, 1315 (Sen. Taft).

[20] *Id.* 1312, 1318, 1322. The sponsors of the amendment also knew that union bargaining demands for such welfare funds were being made with increasing frequency. *Id.* 1305, 1319-1320 (Sen. Ball).

prohibited such a demand, or that would have prohibited a supporting strike. Instead, § 302(c)(5) merely restricted the form of such funds and specified certain features of the funds' administration.

Thus, despite the intense congressional interest in the proper scope of multi-employer bargaining, and the fact that the debate on that subject had just closed when § 302 was taken up, there was *no* attempt in the Senate to adopt any restrictions that would keep the UMW from striking in support of its expected demand for employer contributions to its welfare fund. Section 302(c)(5), both as proposed and as enacted, treats multi-employer funds exactly the same as it does single-employer funds, and nowhere in the debate over § 302 did any Senator suggest that the right to strike to secure a single employer fund of the sort described in § 302(c)(5) was in any way restricted.[21]

In fact, in the debate over § 302(c)(5), not a single Senator invoked the concept of voluntary association of employers in multi-employer *bargaining*, which had figured so prominently in the just-concluded debate on the Taft-Ball amendment addressed to that subject. The necessary inference is that the concerns discussed in debate over multi-employer bargaining—the concerns that motivated § 8(b)(1)(B)—were considered to be unconnected with the problem addressed by § 302(c)(5).

Nor did any Senator suggest that the amendment which became § 302(c)(5) would restrict bargaining for employer participation in multi-employer funds or prohibit strikes in support of such bargaining demands. On the contrary, Senators Ball and Taft repeatedly assured the Senate that this provision had a very limited purpose: to protect the *employees* whose labor produced the fund. In the closing minutes of the debate, Senator Ball made

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[21] The debates on that amendment appear at 2 Leg. Hist. 1302-1323.

the following statements about the limited purpose of § 302(c)(5):

> All that is sought to be done by the amendment is to protect the rights of employees. After all, on any reasonable basis, payments by an employer to such a fund are in effect compensation to his employees. All that is sought to be done in the amendment is to see to it that the rights of employees in the fund are protected.
>
> * * *
>
> . . . [A]ll we seek to do by the amendment is to make sure that the employees whose labor builds this fund and who are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled.

2 Leg. Hist. 1321-1322.[22] Senator Taft also represented that the only effect of § 302(c)(5) on existing funds would be to require employer representation in the fund's administration, 2 Leg. Hist. 1312, 1314. The amendment passed by a narrow margin. *Id.* 1323.

Subsequently, when the House conferees acceded to the Senate bill in all major respects,[23] and had to return to the House and report that they had conceded both the ban on industry-wide bargaining and the ban on welfare funds, 1 Leg. Hist. 882 (Rep. Hartley), they did not suggest that they had nonetheless succeeded in prohibiting John L. Lewis from renewing his demand for employer contributions to an industry-wide welfare fund, if that fund complied with § 302(c)(5). Neither the House Managers' statement attached to the Conference Report, nor the debates on the conference agreement contain any such suggestion.[24]

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[22] *See also id.* 1304 (Sen. Ball); *id.* 1311 (Sen. Taft).

[23] *Id.* 1526 (Sen. Taft).

[24] The House Managers' Statement is reprinted in 1 Leg. Hist. at 534. It stated that the "subject matter" of industry-wide bargaining "has been omitted from the conference agreement." H.R.

This legislative history alone compels the conclusion that Congress, in enacting the Taft-Hartley Act, understood that it had not prohibited unions from striking to obtain employer agreement to participate in any welfare fund, but that it had only regulated the form of those funds in the interest of employees.

Second, the language used in § 8(b)(1)(B) and in § 302(c)(5) confirms the discrete nature of the two provisions and of the concerns they address. The term "collective bargaining," as it is used in § 8(b)(1)(B), is defined by § 8(d); both of these provisions were enacted in 1947.[25] Section 8(d) states that collective bargaining is:

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession....

This definition plainly describes the process by which the employer and the union attempt to reach an agreement by negotiation, and, failing agreement, are free to settle their differences by resort to their respective economic weapons of lockouts and strikes, without any com-

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Rep. No. 510, 80th Cong., 1st Sess. 59 (1947) (hereinafter "Conference Report"), 1 Leg. Hist. 563. The description of § 302 appears in Conference Report 59, 1 Leg. Hist. 570-571.

The House debates on agreeing to the conference report are in 1 Leg. Hist. 871-900.

[25] Both sections originated in S. 1126, 80th Cong., 1st Sess. Title I, 1 Leg. Hist. 112, 114-115.

pulsion to reach agreement. The freedom from government compulsion to reach agreement and the right to resort to economic weapons are at the "core" of the collective bargaining process contemplated by Congress. *Bus Employees* v. *Missouri*, 374 U.S. 74, 82 (1963). See also *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212, 219 (1979), and cases cited therein.

The process of "adjustment of grievances" as contemplated by Congress is similarly based on the concept that either party is free to reach agreement or not, without governmental compulsion. When § 8(d) as passed by the Senate was submitted to Conference, the provision included a requirement that the parties meet and confer with respect to "the negotiation of an agreement, or the settlement of any question arising thereunder." H.R. 3020 (Senate version) § 8(d), 1 Leg. Hist. 242. The conferees omitted the phrase "the settlement of," explaining that those words "might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract." Conference Report at 35, 1 Leg. Hist. 538. Congress also expressed the principle of voluntary rather than compulsory arbitration in § 203(d) of the LMRA, 29 U.S.C. § 173(d), also enacted as part of Taft-Hartley. Section 203(d) provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

See e.g., *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960). Rather than compelling the resolution of grievances by arbitration, Congress merely expressed a preference that unions and employers provide for arbitration by contract. *See also*, *e.g.*, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960); *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 382 (1974).

Throughout the legislative history of Taft-Hartley, the sponsors of the legislation took special pains to declare that the principle of free collective bargaining would be preserved, with no compulsory arbitration of disputes, either in the negotiation of contracts or in their interpretation.[26]

The process established by § 302(c)(5) is totally different from the processes of collective bargaining and the adjustment of grievances, as Congress conceived the latter. The function of the trustees of a § 302(c)(5) trust is described as "administration," § 302(c)(5)(B). The trustees operate under a written agreement between the union and the employers, itself the product of collective bargaining under § 8(d). That agreement must specify "the detailed basis upon which [benefit] payments are to be made" from the fund, *id.* The functions of a trustee in administering the trust fund are thus "of a far different order than [the] duties [of a] collective bargaining agent," as this Court held in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971).

In addition, the provisions governing dispute resolution in administration of a § 302(c)(5) trust are wholly at odds with the concept of collective bargaining and grievance adjustment embodied in the National Labor Relations Act. The trustees of such a trust, unlike representatives for collective bargaining or grievance adjustment, are not left free to deadlock on important questions of trust administration. Nor is it left to the parties to decide whether they will provide an arbitration mecha-

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[26] Senate Report at 13-14, 1 Leg. Hist. 419-420. Senator Taft, the bill's sponsor, insisted in debate that the bill was based upon "the theory of the Wagner Act" that labor disputes should be solved through "free collective bargaining" rather than compulsory arbitration. 2 Leg. Hist. 1653. *See also id.* at 1008, 1520. The Conference change in the language of § 8(d), described above, is further evidence of this special care to avoid compulsory arbitration in the collective bargaining arena.

nism to resolve disputes over interpretation or application of the trust agreement that arise in the administration of the trust. Section 302(c)(5)(B) requires the union and employer to provide a mechanism for resolving such disputes. If they do not provide such a mechanism, and if there is a deadlock between the employer and the employee representatives in administration of the trust, the statute authorizes the court to appoint an umpire to resolve the dispute. It is inconceivable that the Congress, which took such pains to be certain that the concept of collective bargaining and grievance adjustment allowed no possibility of compulsory arbitration, nonetheless considered that the process of trust administration described in § 302(c)(5)(B), with a compulsory mechanism for dispute resolution, constituted collective bargaining or grievance adjustment within the meaning of § 8.

The basis for the Third Circuit's contrary decision in this case is its belief that Congress, in requiring employers to be represented in fund administration, expected that the employer and employee representatives would engage in "ongoing collective bargaining," with the employer trustee advancing the particular interests of the employer and the union trustee advancing the particular interests of the union, and that representation of the opposing interests was "essential to the operation of section 302(c)(5)." NLRB Pet. App. 13a-14a. That view has no support in the legislative history of § 302(c)(5). That history shows that Congress insisted on having employer representatives take part in fund administration not to further any interest of employers but solely to protect the interests of the employees whose labor had produced the fund. Page 16, *supra*.

The primary means by which this aim was to be accomplished was the requirement that the money be held in trust under a written agreement defining the purposes for which the money could be spent, and thus creating in

the employees a right to the prescribed benefits. That requirement was described by Senator Ball as "the heart of the amendment." 2 Leg. Hist. 1321.[27]

The provision for joint administration of the fund was regarded as a secondary means for achieving the same purpose. Senator Taft, upon being questioned on the floor of the Senate about the reason for requiring joint administration, responded, "This is, in a way, a stopgap provision until a further study can be made, in order that abuses may not arise." 2 Leg. Hist. 1313. In fact, opponents of the amendment objected to the joint administration requirement on the ground that many employers regarded that obligation as a burden.[28] At no point in the debate on this issue did the sponsors of the amendment counter those statements or state that it was necessary or desirable for the interests of employers to be represented in the administration of the funds.[29] On the contrary, they repeatedly stated that their sole purpose was to protect the interests of the employees in the

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[27] *See also* 2 Leg. Hist. 1311-1312. In that passage Senator Taft explained the purpose of the trust requirement:

> The purpose of the amendment is to require that the fund shall be established in definite, detailed form, in the form of a trust fund, with respect to which the employees can determine their rights and can insist upon them.

Id. at 1312.

[28] Senator Murray made the following statement in the floor debates:

> As a matter of fact, there are many employers who, having agreed to the establishment of such funds as the result of free and voluntary collective bargaining, would object strenuously to any measure compelling them to join in the administration of the funds. For them, it would mean additional record keeping, resulting in increased costs, and requiring them to devote a part of their time and energy to the supervision of activities which are not of direct concern to them.

Id. at 1316. *See also id.* at 1315 (Sen. Ives); *id.* 1319 (Sen. Morse).

[29] The debate on this amendment appears at 2 Leg. Hist. 1302-1323.

fund.[30] In effect, the proponents of the amendment drafted employer representatives to serve as watchdogs in order to keep union officials from using money for purposes not permitted by a trust agreement. *See* 2 Leg. Hist. 1321 (exchange between Senators Barkley and Ball). *See also Denver Metro. Ass'n* v. *Journeyman Plumbers*, 586 F.2d 1367, 1374-75 (10th Cir. 1978).[31]

Third, as just noted, Congress enacted § 302(c)(5) to ensure that monies paid into labor-management pension and welfare funds can be used only for the specific and defined purposes of the fund. The mechanism chosen to promote this end was the trust. This choice further confirms the distinct nature of § 8(b)(1)(B) representatives and § 302(c) trustees.

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[30] *See* page 16, *supra*; *id.* at 1312 (Sen. Taft); *id.* at 1321 (Sen. Ball). The only statement by any Senator on this amendment that suggests any concern for the interests of employers is a statement made by Senator Wiley, who was neither a member of the Committee on Labor and Public Welfare nor a sponsor of the amendment, *id.* at 1469, made after the amendment was adopted, describing it as a provision "giving employers their rightful voice in the administration of union welfare funds and limiting the uses for which the money may be spent." *Id.* at 1471. Senators Ball and Taft, in their efforts to obtain passage of the bill and later to override the presidential veto, continued to declare that the sole purpose of § 302 was to protect the interest of the employees. *See id.* at 1498, 1640; *id.* at 1524, 1627 (radio speeches made while the legislative effort was still underway, and reprinted in the Appendix to the Congressional Record). In that context, no weight can be accorded to Senator Wiley's statement.

[31] In construing another provision of Taft-Hartley, which, like this one was the subject of floor debates in which Senator Taft assured the Senate of its limited purpose, this Court stated: "[Senator Taft's] view of the limited reach of § 610, entitled in any event to great weight, is in this instance controlling." *Pipefitters* v. *United States*, 407 U.S. 385, 409 (1972). The same weight should be accorded to the statements of Senators Taft and Ball on § 302(c)(5).

The common law principles of trust on which Congress relied in § 302(c)(5) leave no room for doubt as to the duties and obligations of fund trustees, and likewise do not tolerate the opposing duties and obligations that § 302 trustees would have if they were deemed to be the bargaining representatives of their appointing parties under § 8(b)(1)(B). The essential obligation of a § 8(b)(1)(B) representative is to be completely loyal to the party he represents in that process. The trustee's fundamental obligation, by contrast, is to the participants and beneficiaries of the fund, not to his appointing party. Bogert, Trusts & Trustees § 543 at 197-98 (2d rev. ed. 1978). *See also* Restatement of the Law of Trusts, Second § 170.

Pre-ERISA lower federal court decisions consistently recognized that trustees of § 302(c)(5) trust funds are bound by the strict common law duty of loyalty to the participants and beneficiaries of the trust. For example, in *Miniard* v. *Lewis*, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968), the Court of Appeals for the District of Columbia Circuit observed, "the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employers or the union." *Id.* at 865, n. 5 (emphasis in original).

The Court of Appeals for the Ninth Circuit has similarly concluded that fund trustees have a duty to exercise "independent judgment" in matters of trust administration, a conclusion plainly at odds with the Third Circuit's imposition of § 8(b)(1)(B) duties on fund trustees.[32] *See Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975):

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[32] It should also be noted that the Third Circuit itself had earlier recognized this fiduciary duty of trustees of Section 302(c)(5) funds in two cases decided some twenty years before the decision now under review. United Marine Division v. Essex Transportation Co., 216 F.2d 410 (3d Cir. 1954); Mechanical Contractors Ass'n v. Local Union 420, 265 F.2d 607 (3d Cir. 1959).

> Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory.

In 1974, Congress enacted ERISA, which gave statutory force to the basic common law trust principles previously applied in interpreting § 302(c). ERISA reconfirms that fund trustees are fiduciaries,[33] whose obligation under § 404 is to act "solely in the interest of the participants and beneficiaries" of the fund. 29 U.S.C. § 1104(a)(1). This statutory obligation tolerates no divided loyalties of the kind mandated by the decision below. *Cf. NLRB* v. *Construction & General Laborers' Local 1140*, 577 F.2d 16, 21 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979); *Blassie* v. *Kroger Co.*, 345 F.2d 58, 75-76 (8th Cir. 1965).

The duties set forth in § 404 of ERISA reflect a federal codification and elaboration of the common law prudent man rule and the requirement of undivided loyalty to the participants and beneficiaries. Clearly a fund trustee cannot serve two masters: he cannot exercise undivided loyalty to the trust fund participants and beneficiaries and at the same time be completely faithful to the party that appointed him, as § 8(b)(1)(B) would require if he also were a collective bargaining representative.

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[33] *See* § 3(21) of ERISA, 29 U.S.C. § 1002(21). Other provisions of ERISA emphasize the strict fiduciary nature of the trustees' obligations. For example, Section 406(b)(2) prohibits a trustee from "act[ing] in any transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries," 29 U.S.C. § 1106(b)(2), and ERISA Section 405 makes one fiduciary liable for a co-fiduciary's breach of his obligations in certain circumstances. 29 U.S.C. § 1105. Section 406(a)(1)(E) and 407 limit the amount and kind of employer property and securities that a trust may acquire. *See* 29 U.S.C. §§ 1106(a)(1)(E), 1107.

II. THE THIRD CIRCUIT'S DECISION WOULD SERIOUSLY DISRUPT THE ADMINISTRATION OF MULTI-EMPLOYER TRUST FUNDS, AND IS AT ODDS WITH THE CONSISTENT INTENT OF CONGRESS TO AUTHORIZE AND ENCOURAGE SUCH FUNDS.

The Third Circuit's ruling that trustees of § 302(c) trust funds are "representatives for purposes of collective bargaining" within the meaning of § 8(b)(1)(B) will seriously disrupt the administration of—and indeed threaten the very existence of—multi-employer benefit funds.

The result of the Third Circuit's ruling is that *each* employer has the right to select *all* the management trustees. Since it is impossible, by definition, for every employer participating in a multi-employer fund to have sole control over the selection of all of the employer-appointed trustees, the Third Circuit's holding will necessarily preclude all use of economic weapons in support of union demands that employers provide pension or welfare benefits to employees through multi-employer trust funds.[34] That result is contrary to the expressed intent of Congress to authorize and encourage such funds, which offer a stability and security that frequently cannot be afforded by smaller funds.[35]

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[34] Even if one were to conclude that the Third Circuit's holding required only that each employer be allowed to select its own trustee for any § 302(c) benefit fund, that would, as recognized by the National Labor Relations Board, "severely impair the continued development of such plans . . . . This is especially so in view of the equal representation requirement of Section 302(c)(5)(B), which would lead to a concomitant increase in the number of union trustees." Sheet Metal Workers' International Ass'n, 234 N.L.R.B. 1238, 1245, 97 L.R.R.M. 1476, 1484 (1978), petition for review pending sub nom. Central Florida Contractors Ass'n v. NLRB, No. 79-2396 (5th Cir. 1979).

[35] The National Labor Relations Board recently commented on this point in holding that the trustee designation clause of amicus

As we noted in Part I, at pages 11-17, *supra*, the legislative history of Section 302(c) demonstrates that Congress decided in 1947 not to prohibit strikes in support of union demands for employer participation in such multi-employer funds, but rather to regulate the form of those funds to protect the interests of the employees for whose benefit they were established. In the years since 1947, Congress has acted on two occasions to encourage—rather than frustrate—the development of multi-employer benefit funds. ERISA, enacted by Congress in 1974, made specific provision for multi-employer plans. *See, e.g.*, Internal Revenue Code § 414(f), 26 U.S.C. § 414(f), 29 U.S.C. § 1002(37). Congress thus contemplated that employer funds would continue to be mandatory subjects of bargaining, and that unions would be able to bargain to impasse and strike over that subject. This view is confirmed by the recently-enacted Multiemployer Pension Plan Amendments Act of 1980, one of the express purposes of which is "to encourage the

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SASMI—a provision that effectively binds employers and local unions entering SASMI to accept the existing trustees until their successors are appointed in accordance with the trust fund provisions—is a mandatory subject of bargaining. As the Board stated:

> If it is true, and we think that it is, that a multiemployer fringe benefit plan can usually operate in a more efficient and financially secure manner than an individual single-employer plan, then certainly the [unions] are privileged to bargain to impasse over such a plan. Similarly, we also consider it to be true that, in order to effectively administer such a plan through the medium of a multiemployer trust fund, the number of trustees must be limited to a reasonable figure. In the instant proceeding, the trustee designation clause is nothing more than the mechanism by which the composition of the board of trustees is so limited.

Sheet Metal Workers' International Ass'n, 234 N.L.R.B. 1238, 1244, 97 L.R.R.M. 1476, 1483 (1978), *review pending*, Central Florida Sheet Metal Contractors' Ass'n, Inc. v. NLRB, No. 79-2396 (5th Cir. 1979). *See also* United Slate, Tile & Composition Roofers, Local No. 220, 177 N.L.R.B. 632, 651, 76 L.R.R.M. 1016 (1969).

growth and maintenance of multiemployer plans." H. Rep. 96-869, 96th Cong. 2d Sess. Part I at 71, Part II at 4, 12 (1980). *See* Section 3(c)(2), Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1209 (1980). The Third Circuit's decision cannot be reconciled with that purpose.

It is thus clear that Congress did not intend the incongruous results that will follow if the Third Circuit's decision is allowed to stand. Multi-employer trust funds had been in operation for more than 25 years when Congress enacted ERISA. Congress obviously is familiar both with such multi-employer funds, and with the collective bargaining process and the undivided loyalty the parties demand of their collective bargaining representatives. It defies logic to suggest that Congress would have enacted the strict fiduciary standards of ERISA if Congress thought that the trustees of such multi-employer funds also owed the obligations to their appointing parties that § 8(b)(1)(B) would impose if they were collective bargaining representatives.

This Court has often recognized that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). The Third Circuit's unduly expansive construction of § 8(b)(1)(B) of the NLRA ignores this settled principle of statutory construction, and frustrates congressional efforts to encourage the growth and maintenance of multi-employer plans and to impose strict fiduciary duties on the trustees of all Section 302(c) funds.[36]

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[36] The legislative history of the recently enacted Multiemployer Pension Plan Amendments Act of 1980 reveals that Congress does not accept the Third Circuit's decision in this case. For example, Senator Randolph referred specifically to the decision below, expressed the opinion that the case would be "overturned on appeal," and asked whether Congress had "ever expressed an intent under

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be reversed.

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ERISA or any other Federal law that an agency status should or does exist between trustees and their appointers." 126 Cong. Rec. S 10104 (daily ed. July 29, 1980). Senator Williams, the sponsor of the 1980 amendments, responded that "[i]n all instances the actions of the trustees must be made with the sole interest of the plan's beneficiaries in mind." *Id.* Similarly, in the House, Congressman Thompson referred to the Third Circuit decision as "an erroneous interpretation of both ERISA and federal labor law [which] does not reflect congressional intent." 126 Cong. Rec. H 7902 (daily ed. August 26, 1980).

These recent expressions of legislative intent, although not determinative with respect to the purpose of earlier legislation, are clearly a relevant consideration, especially since the recent amendments are "another major step in an evolving pattern of regulation." NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, 194 (1967).

Nos. 80-289 and 80-692

IN THE

Supreme Court of the United States

October Term, 1980

UNITED MINE WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AMAX COAL COMPANY
A DIVISION OF AMAX, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Nos. 80-289 and 80-692

IN THE

Supreme Court of the United States

UNITED MINE WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

AMAX COAL COMPANY
A DIVISION OF AMAX, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

STATEMENT OF INTEREST

The Bituminous Coal Operators' Association, Inc. (BCOA) is a multi-employer bargaining association which represents approximately 160 member coal operators in collective bargaining matters with the United Mine Workers of America (UMWA). BCOA and the UMWA negotiate the terms of the National Bituminous Coal Wage Agreement, pursuant to which

the United Mine Workers of America 1974 Pension Trust was established. This jointly-administered trust covers approximately 140,000 active and 9,000 retired participants. Operators represented by BCOA account for approximately 75% of total contributions to the Trust.

Under the terms of the 1974 Pension Trust, BCOA, as representative of employers contributing 51% or more of the total annual contributions to the Trust, appoints one of the Trust's three (3) trustees. BCOA is concerned that the decision of the Court of Appeals below, by holding that management-appointed trustees serve as collective bargaining representatives of the employer, may detrimentally affect labor relations in the mining industry and the efficient administration of the Trust. Its interest is evidenced by the fact that the subject matter of the litigation is the fund established by BCOA. BCOA believes that its views as the bargaining representative of participants in the fund will not otherwise be presented to the Court in this litigation. It has obtained the consent of all parties before the Court to file its brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The Court of Appeals has held that management-appointed trustees of jointly-administered benefit trusts owe a divided loyalty to management as well as to participants and beneficiaries of the trusts. This decision sharply conflicts with the fiduciary responsibilities imposed on fund trustees by the Labor Management Relations Act of 1947 (LMRA) and the Employee Retirement Income Security Act of 1974 (ERISA).

Nothing in the LMRA indicates that the otherwise strict common law duty of undivided loyalty to beneficiaries is inapplicable to fund trustees. Indeed, judicial precedent interpreting trustee responsibilities

under the LMRA has emphasized this fundamental duty.

Congress codified the fiduciary status of trustees in Section 404 of ERISA: a trustee must "discharge his duties ... solely in the interest of the participants and the beneficiaries and ... for the exclusive purpose of ... providing benefits to the participants and their beneficiaries ...." Indeed, Congress' careful formulation of general and specific fiduciary obligations in ERISA suggests that it understood the proper role of trustees to be one of undivided allegiance to plan participants and beneficiaries. The decision of the Court of Appeals stands as an anomaly that cannot be reconciled with either the legislative scheme incorporated in ERISA and the LMRA or with the judicial precedent interpreting congressional intent in this area.

Moreover, by holding that management-appointed trustees are collective bargaining representatives within the meaning of Section 8(b)(1)(B), the Court of Appeals has improperly extended the NLRB's jurisdiction to encompass employee benefit fund administration and regulation — an area already committed by Congress to the Courts and to the Secretary of Labor under Sections 301-303 of the LMRA and Title I of ERISA. The decision constitutes an attempt to usurp a policy-making function which is properly vested in our legislative branch and should, therefore, be reversed.

ARGUMENT

A. THE COURT OF APPEALS' HOLDING THAT MANAGEMENT-APPOINTED TRUSTEES OF JOINTLY-ADMINISTERED BENEFIT TRUSTS OWE A DIVIDED LOYALTY TO MANAGEMENT AS WELL AS TO PARTICIPANTS AND BENEFICIARIES CONFLICTS WITH THE STATUTORY SCHEME OF TRUST FUND ADMINISTRATION ARTICULATED

BY CONGRESS IN THE LABOR MANAGEMENT RELATIONS ACT OF 1947 AND IN THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

The Court of Appeals, in a heretofore unprecedented decision, has held that the management-appointed trustees of jointly-administered labor-management benefit funds are "collective bargaining representatives" for purposes of Section 8(b)(1)(B) of the National Labor Relations Act (NLRA), 29 U.S.C. §158(b)(1)(B). Under this ruling, management-appointed trustees are concurrently answerable to management as well as to the employee participants and beneficiaries of a fund. The decision directly conflicts with the statutory scheme of trust fund administration articulated by Congress in the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. §141 *et seq.*, and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.*, and should, therefore, be reversed.

Section 302 of the LMRA, 29 U.S.C. §186, was Congress' initial attempt to regulate the management of collectively bargained employee pension and welfare benefit funds. The statute, enacted as an anti-bribery measure, generally forbids all employer payments to representatives of employees. Section 302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5), however, sets forth a limited exception to the Act's general prohibition for employer payments to jointly-administered trust funds established for the sole and exclusive benefit of the contributing employers' employees and their families and dependents. The Act lists specific benefits which may be provided by the funds and prescribes certain requirements for their administration. The basic intent of this initial legislative effort was to prevent manipulation and exploitation of the funds by union officers. *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959). By removing sole control from the unions, Congress believed it could

prevent fund assets from becoming "war chests" for powerful unions. *Blankenship* v. *Boyle*, 329 F. Supp. 1089, 1094-1095 (D.D.C. 1971), *aff'd mem.*, 511 F.2d 447 (D.C. Cir. 1975).

Thus, to prevent potential union abuse, Congress established the principle of equal representation in trust-fund administration. Pursuant to Section 302(c)(5)-(B) of the LMRA, 29 U.S.C. §186(c)(5)(B), "employers and employees [must be] equally represented in the administration of such fund[s], together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon ...." By including dispute resolution mechanisms in the statute, together with the requirement of equal representation, Congress attempted to shield fund administration from the confrontation politics that often mark labor management collective bargaining. *See Blankenship* v. *Boyle*, *supra* at 1094.

Congress believed it could temper the anticipated differences between management-appointed trustees and union-appointed trustees by providing that the parties may select a neutral trustee to participate in trust administration. There is nothing, however, "in the Labor Management Relations Act or other federal statutes or in their legislative history which can be said to alleviate the otherwise strict common-law fiduciary responsibilities of trustees appointed for employee welfare or pension funds developed by collective

bargaining." *Id.*[1] Thus, trust administration under Section 302 of the LMRA was "designed not to alter, but to reinforce 'the most fundamental duty owed by the trustee': the duty of undivided loyalty to the beneficiaries." *Id.* at 1095 (citation omitted). The Court of Appeals' decision, which holds that management-appointed trustees are collective bargaining representatives owing dual loyalties to management as well as to trust participants and beneficiaries, is fundamentally at odds with this Congressional scheme.

Congress codified the fiduciary status of trustees when it enacted ERISA. Section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1), sets forth general fiduciary obligations and requires, *inter alia,* that a trustee "discharge his duties with respect to a plan *solely* in the interests of the participants and beneficiaries and ... for the *exclusive* purpose of ... providing benefits to participants and their beneficiaries ...." (Emphasis supplied). Thus, the Act follows and codifies the common law with respect to a fiduciary's duties and obligations. In addition, ERISA contains a detailed list of specific fiduciary prohibitions, which elaborate the principle that trustees owe an undivided loyalty to fund participants and beneficiaries. In fact, in order to achieve more practical enforcement of the law, Congress adopted the specific prohibited transaction

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[1]Bogert succinctly explained the duties and obligations of trustees at common law in his treatise, *Trust and Trustees,* 2d ed., Ch. 26, §543:

> One of the most fundamental duties of the trustee is that he must display throughout the administration of the trust complete loyalty to the interest of the cestui que trust, and must exclude all selfish interests and all consideration of the welfare of third persons .... Reasons behind the establishment of the loyalty rule by equity are that it is generally, if not always, humanly impossible for the same persons to act fairly in two capacities and on behalf of two interests in the same transaction.

approach as an alternative to a general conflict-of-interest rule prohibiting dealings on other than an arm's length basis. *See* S. Rep. No. 93-383, 93rd Cong., 1st Sess. 94-95 (1975).

Section 406(b)(2), 29 U.S.C. §1106(b)(2), sets forth one of ERISA's specific proscriptions on fiduciary self-dealing and prohibits a trustee from "act[ing] in an transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants[2] or beneficiaries."[3] The House Conference Committee explained that this provision "prevents a fiduciary from being put in a position where he has *dual loyalties,* and, therefore he cannot act exclusively for the benefit of a plan's participants and beneficiaries." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 309 (1974) (Emphasis added.)

ERISA section 408(c)(3), 29 U.S.C. §1108(c)(3), contains one of the Act's exceptions to its prohibited transaction provisions and recognizes that an "officer, employee, agent or other representative of a party in interest" with respect to a plan may also serve as a plan trustee. Nothing in that section, however, suggests that a trustee remains primarily or even equally responsible to the party appointing him or acts as a collective bargaining representative of the appointing party when he assumes fiduciary responsibility as a trustee. Rather, section 408(c)(3) reflects Congress' perception that its comprehensive prohibited transaction provisions might

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[2]A participant under Section 3(7) of ERISA, 29 U.S.C. §1002(7), includes "any employee ... who is or may become eligible to receive a benefit of any type from an employee benefit plan ...."

[3]A beneficiary under Section 3(8) of ERISA, 29 U.S.C. §1002(8), is defined as a "person designated by a participant or by the terms of an employee benefit plan who is or may become entitled to a benefit thereunder."

otherwise be construed to prevent logical candidates for trustee positions on labor-management funds from serving in that capacity. Indeed, ERISA's carefully crafted general and specific fiduciary obligations reflect that Congress' perception of trustees had evolved from its partisan-representative origins that were suggested in certain aspects of Section 302 of the LMRA, to that of neutral fiduciaries owing undivided allegiance to participants and beneficiaries notwithstanding any partisan positions simultaneously held by the individuals involved.

That the Court of Appeals has obfuscated the statutory directive of Congress by holding that fund trustees remain responsible to their appointing parties is further demonstrated by the comments of ERISA's original sponsors during recent Congressional debate on the 1980 amendments to the Act.[4] Senator Jennings Randolph of West Virginia addressed the Chairman of the Senate Labor and Public Welfare Committee seeking clarification of Congressional intent in enacting ERISA's fiduciary provisions:

> Although this bill has added new and additional responsibilities of plan trustees, particularly under the reorganization provisions of the bill, is it not correct that this legislation reaffirms the present law, that these plan trustees as fiduciaries still have the sole responsibility, as I understand it, to the beneficiaries of the plan? My concern is partly based on a recent Court of Appeals decision [the Third Circuit decision below], which I believe will be overturned on appeal, that

[4]The Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, 29 U.S.C. §1001a *et seq.*, amending ERISA's plan termination insurance provisions as they relate to collectively bargained multiemployer pension plans, was enacted on September 26, 1980.

> apparently suggests that the trustee[s] have some obligations to the parties who appoint them. I do not believe that we in the Congress have ever expressed any intent under ERISA or any other federal law that an agency status should or does exist between trustees and their appointers. 126 Cong. Rec. S10104 (Daily ed. July 29, 1980).

Chairman Harrison Williams of New Jersey responded:

> I am happy to respond to the Senator from West Virginia that that is the situation and that is correct. In all instances the actions of the trustees must be made with the sole interest of the plan's beneficiaries in mind. That was, that is, and that will be. *Id.*

On the House side, Representative Frank Thompson of New Jersey expressed his disapproval of the Court of Appeals decision below:

> Although this bill has added important new responsibilities for plan trustees, particularly under the reorganization provisions, this legislation simply reaffirms the present law, that these plan trustees as fiduciaries have sole responsibility to the participants and beneficiaries of the plan. A recent Court of Appeals decision, Amax Coal Company against NLRB which was wrongly decided, apparently suggests that the trustees are collective bargaining agents for the parties who appoint them. That is an erroneous interpretation of both ERISA and federal labor law and does not reflect Congressional intent. 126 Cong. Rec. H7902 (Daily ed. Aug. 26. 1980).

Judicial precedents interpreting ERISA and the LMRA have correctly held that the duties of trustees, in administering employee benefit trusts, differ distinctly from the duties of collective bargainers in negotiating contract provisions. Indeed, this Court noted in *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co., Chemical Division,* 404 U.S. 157, 170 (1974), that "the union's role in the administration of the fund is of a different order from its duties as collective bargaining agent." Similarly, in *Miniard* v. *Lewis,* 387 F.2d 864 (D.C. Cir. 1967), the Court of Appeals for the D.C. Circuit contrasted the duties of bargaining representatives with the duties of appointed trustees. There, the court rejected an employee's assertion that the union's duty of fair representation extended to the union-appointed trustees. The court explained:

> Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because as trustees, they perform a separate function and do not act as representatives of either the employers or the union. *Id.* at 865, n.5 (Emphasis supplied).

In *Toensing* v. *Brown,* 528 F.2d 69 (9th Cir. 1975), the Court of Appeals for the Ninth Circuit compared the duties and responsibilities owed by trustees to their appointing parties with the duties owed to the participants and beneficiaries of the trust fund. The court explained that, while trustees act properly by considering the views of the collective bargaining parties:

> Trustees have a duty to exercise their independent judgment in administering trust

> funds established under §302 of the Labor Management Relations Act. Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory. *Id.* at 72.

Finally, in *Lamb* v. *Carey,* 498 F.2d 789, 793 (D.C. Cir. 1974), *cert. denied sub nom. Carey v. Davis,* 419 U.S. 869 (1974), the Court of Appeals for the D.C. Circuit emphasized that "[r]egardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries."

Each of these decisions reinforces the notion that when a trustee undertakes a role in trust fund administration, his most fundamental duty is that of "undivided loyalty to the beneficiaries." *Blankenship,* 329 F. Supp. at 1095. By holding that management-appointed trustees remain responsible to management as well as to participants and beneficiaries of the trusts, the Court of Appeals below has unnecessarily threatened the basic fiduciary principles incorporated in ERISA and Section 302 of the LMRA.

While it is unrealistic to assume that management trustees can totally detach themselves from the fact that they were appointed by employers, it is equally unrealistic to assume that these trustees, if invested with the statutory obligation to act as collective bargaining representatives, can administer the trust at all times consistent with the best interests of the participants and beneficiaries. Indeed, the Court of Appeals' holding that management-appointed trustees are collective bargaining representatives under the NLRA creates a myriad of practical difficulties in trust fund administration. If the Court of Appeals' decision is affirmed, it is likely that trust administration would become an

ancillary forum for the collective bargaining process. Specifically, one set of bargaining representatives might be inclined to make concessions with respect to issues of trust administration, in return for concessions on other non-trust related issues. In this scenario, decisions reached by the trustees could very well be prejudicial, or at the least, insensitive, to the interests of the participants and beneficiaries of the fund.

The two-judge panel of the Court of Appeals, in its brief and conclusory treatment of the trustee-status issue, rejected the well-reasoned NLRB opinion below, *United Mine Workers of America, Local No. 1854 (Amax Coal Co.)*, 238 NLRB 1583 (1978), and the NLRB's decision in *Sheet Metal Workers' International Association*, 234 NLRB 1238 (1978). Moreover, the court overruled or significantly limited several of its own decisions interpreting ERISA and the LMRA without so stating.[5]

In both the decision below and in the previous case, *Sheet Metal Workers' International Association*, 234 NLRB 1238 (1978), *petition for review pending sub nom. Central Florida Sheet Metal Contractors Association* v. *NLRB*, No. 79-2396 (5th Cir. 1979), the NLRB concluded that management-apponted trustees of Section 302(c)(5) benefit trusts are not collective bargaining representatives within the meaning of

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[5]*United Marine Division, I.L.A., Local No. 333* v. *Essex Transportation Co.*, 216 F.2d 410 (3d Cir. 1954); *Mechanical Contractors Association of Philadelphia, Inc.* v. *Local Union 420*, 265 F.2d 607 (3d Cir. 1959); *Cutaiar v. Marshall*, 590 F.2d 523 (3d Cir. 1979).

Section 8(b)(1)(b) of the NLRA.[6] The Court of Appeals panel, however, relying on dictum from its previous decision in *Associated Contractors of Essex County, Inc.* v. *The Laborers International Union of North America*, 559 F.2d 222, 228 (3d Cir. 1977) (trustees of a Section 302(c)(5) trust fund are engaged in an "ongoing collective bargaining process"), reached an opposite result.

Surprisingly, the Court of Appeals failed to acknowledge that its opinion overruled or severely restricted several of its own decisions. For example, the court had previously described the role and duties of trustees under Section 302 of the LMRA in *United Marine Division, I.L.A., Local No. 333* v. *Essex Transportation Co.*, 216 F.2d 410, 412 (3d Cir. 1954). There, the Court stated that:

> These trustees were not, in our judgment representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this

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[6]The Secretary of Labor filed *amicus curiae* briefs supporting this position in both cases. The Secretary's interest in this issue stems from his administration and enforcement of fiduciary responsibility standards and other provisions of Title I of ERISA. In urging the Board to hold that trustees of these jointly-administered trust funds are not collective bargaining representatives within the meaning of the NLRA, the Secretary argued that the fiduciary obligations imposed by ERISA are diametrically opposed to the obligations of a collective bargaining representative. In the Secretary's view, to hold that trustees of multiemployer benefit funds also serve as collective bargaining representatives would place them in "a virtually untenable position 'regarding the proper execution of their fiduciary duties, obligations and responsibilities to the plans participants'." *Sheet Metal Workers' International Association*, 234 NLRB 1238, 1246 (1978).

> case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out.

Accord, Mechanical Contractors Association of Philadelphia, Inc. v. Local Union 420, 265 F.2d 607 (3d Cir. 1959) (when an individual acts as trustee, he is not a "representative of an employee" within the prohibitions of Section 302(a) and (b) of the LMRA). The court's interpretation of trustees' fiduciary duties in these cases is certainly at odds with the dual-loyalty theory subscribed to in the decision below.

Finally, in *Cutaiar v. Marshall* 590 F.2d 523 (3d Cir. 1979) the Third Circuit enforced the Secretary of Labor's finding that common trustees of two related benefit funds engaged in a *per se* violation of ERISA's prohibited transaction provisions by authorizing loans between the funds. The court held that the loans were illegal under Section 406(b)(2) of ERISA because the common trustees acted on both sides of the transactions by representing both the lender fund and borrower fund. Clearly, the Court of Appeals' recognition and application of the stringent fiduciary standards imposed by Section 406(b)(2) on fund trustees in *Cutaiar* cannot be squared with its holding below that trustees, as collective bargaining representatives, are answerable to their appointing parties in addition to the participants and beneficiaries of the fund.

It is readily apparent that the decision of the Court of Appeals below is an anomaly that cannot be reconciled with either the statutory scheme of trust fund administration incorporated in ERISA and the LMRA or with the judicial precedent interpreting congressional

intent in this area. The decision, therefore, should be reversed.

B. THE COURT OF APPEALS' DECISION IMPROPERLY INJECTS THE NATIONAL LABOR RELATIONS BOARD INTO THE REGULATION OF JOINTLY-ADMINISTERED BENEFIT TRUST FUNDS BY HOLDING THAT TRUST FUND ADMINISTRATION IS COLLECTIVE BARGAINING FOR PURPOSES OF THE NATIONAL LABOR RELATIONS ACT.

The Court of Appeals, by holding that appointed trustees are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the Act, has improperly extended the NLRB's jurisdiction to encompass employee benefit fund administration and regulation — an area which has already been committed by Congress to the Secretary of Labor and the Courts under Sections 301-303 of the LMRA and Title I of ERISA. The Court has stated that the NLRA should not be interpreted to thrust the National Labor Relations Board "into a new area of regulation which Congress ha[s] not committed to it." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979), quoting from *NLRB* v. *Insurance Agents*, 361 U.S. 477, 499 (1960).

Moreover, the decision necessarily subjects trustees to the duty of good faith bargaining as set forth in Sections 8(a)(5), 8(b)(3) and (8)(d) of the NLRA. Thus, for the first time, trustees may be found to have violated the Act by refusing to bargain when they deadlock over administrative and policy issues. Yet, Congress fully expected that trustee deadlocks would occur and incorporated into the LMRA certain mechanisms for dispute resolution. Congress never indicated that trustee disputes over fund administration could also be subject to resolution by the Board or that such disputes could subject the trustees to penalties and remedial orders outside of those prescribed in the LMRA and

ERISA. Finally, the logical consequence of the discussion above is that unhappy participants may now be permitted to sue union-appointed trustees under Section 301 of the LMRA for breach of the duty of fair representation. ERISA, however, contains extensive provisions for trustee liability for breach of fiduciary duty to plan participants and beneficiaries. It does not contemplate concurrent trustee or union liability for breach of the traditional duty owed by a union to its members. Cf. *Miniard* v. *Lewis*, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968) (union trustees owe no duty of fair representation under the LMRA).

The statutory conflicts engendered by the opinion below are both real and obvious. The decision is fundamentally inconsistent with provisions of the LMRA and ERISA and constitutes "an attempt to usurp 'major policy decisions properly made by Congress'." *Ford Motor Co., supra* at 497, quoting from *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). The decision below should be reversed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Consolidated Case Nos. 80-289 and 80-692

UNITED MINE WORKERS OF AMERICA
LOCAL NO. 1854

and

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Petitioners

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AMAX COAL COMPANY, A DIVISION OF AMAX, INC.,
Respondents

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AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the trustees of multiemployer trusts established pursuant to Section 302(c)(5) of the Labor-Management Relations Act, 1947, 29 U.S.C. §186(c)(5)(1978), function in the administration of those trusts as "representatives for the purposes of collective bargaining" within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(B)(1978).

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OTHER AUTHORITIES

Bogert, *Trusts and Trustees*, (2d rev.ed. 1978)
§543 9
126 Cong.Rec.S10104 (daily ed. July 29, 1980) 12,15
126 Cong.Rec. H7902 (daily ed. August 26, 1980) 12,15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Consolidated Case Nos. 80-289 and 80-692

UNITED MINE WORKERS OF AMERICA
LOCAL NO. 1854

and

UNITED MINE WORKERS OF AMERICA,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

and

AMAX COAL COMPANY, A DIVISION OF AMAX, INC.,
Respondents

and

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

Amicus curiae is the Board of Trustees of the United Mine Workers of America ("UMWA") Health and Retirement Funds ("Funds"). The Funds is the collective name for four irrevocable multiemployer trust funds established by the UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA") in Article XX of the National Bituminous Coal Wage Agreement of 1974 ("1974 Wage Agreement"), pursuant to, and within the scope of, Section 302(c)(5) of the Labor-Management Relations Act, 1947 ("LMRA"), 29 U.S.C. 186(c)(5)(1978). The four trusts are the UMWA 1950 Pension Trust, the UMWA 1974 Pension Trust, the UMWA 1950 Benefit Trust, and the UMWA 1974 Benefit Trust ("Trusts"). Article XX of the National Bituminous Coal Wage Agreement of 1978 ("1978 Wage Agreement") provides for the continuation of the Trusts as amended by the UMWA and the BCOA. The Trusts are employee benefit plans within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1002(3)(1978).

Article XX, Section (e) of the Wage Agreements provides for the administration of the Trusts by a Board of three Trustees appointed for the duration of the Wage Agreements and subject to removal only for cause. Pursuant to the Wage Agreements, and in accordance with Section 302(c)(5)(B) of the LMRA, one Trustee is appointed by the UMWA, one by the BCOA, and the third, a neutral, by the other two. The current Trustees of the Trusts are Harrison Combs, Chairman, appointed by the UMWA; John J. O'Connell, appointed by the BCOA; and Paul R. Dean, the neutral Trustee.

The powers and responsibilities of the Trustees are enumerated in the Trust documents. Under those documents, the Trustees have full discretionary authority to manage and control Trust assets. In that respect, the Trustees are plan fiduciaries within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. §1002(21)(A). Accordingly, the fiduciary duties imposed by Section 404 of ERISA, 29 U.S.C. §1104, and the prohibitions of Section 406 of ERISA, 29 U.S.C. §1106, fully apply to the Trustees. A Trustee who breaches the fiduciary obligations imposed by those provisions is personally liable under Section 409 of ERISA, 29 U.S.C. §1109, for any resultant losses to the Trust. Under Section 405 of ERISA, 29 U.S.C.

§1105, a Trustee is also liable for a breach of fiduciary duty by a co-Trustee, if he has knowledge of the breach.

The Third Circuit has decided that the UMWA and BCOA Trustees of the Funds (hereinafter "the Trustees") are representatives of their appointing parties for the purpose of collective bargaining, within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(b)(1)(B)(1978). The Trustees, however, cannot assume that status consistent with the fiduciary obligations imposed upon them by Sections 404 and 406 of ERISA. Consequently, the decision of the Third Circuit places the Trustees in a virtually untenable position. Indeed, the decision exposes the Trustees to substantial liability under Sections 405 and 409 of ERISA. Clearly, the Trustees have a serious interest in having the Supreme Court reverse that decision.

STATUTORY PROVISIONS INVOLVED

The following provisions of ERISA are relevant to the interest of the *amicus curiae* in this case:

Section 404(a)(1)(A), 29 U.S.C. §1104

> (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> > (A) for the exclusive purpose of:
> > (i) providing benefits to participants and their beneficiaries. . . .

Section 405(a)(3), 29 U.S.C. §1105

> (a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> . . .
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Section 406(b)(2), 29 U.S.C. §1106

(b) A fiduciary with respect to a plan shall not—

. . .

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . .

Section 409(a), 29 U.S.C. §1109

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of Section 411 of this Act.

The following provision of the LMRA is relevant to the interests of the *amicus curiae* in this case:

Section 302(c)(5), 29 U.S.C. §186

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or any other thing of value paid to a trust fund . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, that . . . (B) . . . employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon. . . .

The following provisions of the NLRA are also involved in this case:

Section 8(b)(1)(B) and (b)(3), 29 U.S.C. §158

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . (B) an employer in the

> selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . .
>
> . . .
>
> (3) to refuse to bargain collectively with an employer. . . .

STATEMENT OF THE CASE

The UMWA, petitioner herein, is an industrial union that represents bituminous coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration.

The respondent, Amax Coal Company, a division of AMAX, Inc. ("Amax"), operates several bituminous coal mines in the midwestern United States. With regard to those mines, Amax is a member of the BCOA, an employers' association which represents bituminous coal operators for purposes of collective bargaining and contract administration. Amax, however, also operates a western sub-bituminous mine. That mine is not within the scope of the BCOA's representation.

In 1974, the UMWA and the BCOA engaged in collective bargaining negotiations which resulted in the adoption of the 1974 Wage Agreement and the establishment therein of the four trust funds, known collectively as the Funds. As a member of the BCOA, Amax participated in the negotiations leading to the adoption of the Wage Agreement and had a voice in the selection of the employers' Trustee.

Amax's western sub-bituminous mine was not covered, however, by the 1974 Wage Agreement. Nor was the mine covered by the Western Surface Coal Mine Wage Agreement of 1975, a separate agreement negotiated by the UMWA and an employer association representing western sub-bituminous and lignite mines. Instead, Amax and the UMWA negotiated directly for an agreement covering Amax's western mine. This case arose from those negotiations.

Included in the contract proposals submitted by the UMWA was a provision known as the "Trustee Clause." The Trustee Clause would have required Amax to participate in the Funds. Amax repeatedly objected to the Clause, on the basis that the Funds' management trustee had already been selected during the negotiations of the 1974

Wage Agreement. The UMWA, however, insisted to impasse upon the Trustee Clause.

In Amax's view, the UMWA's insistence upon the Trustee Clause constituted coercion in its selection of a collective bargaining representative within the meaning of Sections 8(b)(1)(B) and 8(b)(3) of the NLRA. Accordingly, in January, 1975, Amax filed an unfair labor practice charge against the UMWA and Local 1854 with the National Labor Relations Board ("Board"). Thereafter, the Director of Region 27 of the Board issued an amended consolidated complaint on behalf of the General Counsel of the Board. The complaint alleged, *inter alia*, that the UMWA had engaged in an unfair labor practice within the meaning of Sections 8(b)(1)(B) and 8(b)(3) of the NLRA, by insisting to impasse on the Trustee Clause.

A hearing on the charges was held on various dates in June and July of 1976, before an Administrative Law Judge. On March 22, 1977, the Judge issued a decision concluding, in relevant part, that the Funds' Trustee appointed by the BCOA is not a representative for purposes of collective bargaining as that term is used in Section 8(b)(1)(B) of the NLRA, and recommending the dismissal of that part of the complaint alleging that the UMWA had violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA. The Board affirmed this conclusion and recommendation as part of its decision and final order issued on September 29, 1978.

Amax and the UMWA petitioned the Third Circuit for review of the Board's entire decision and order. The Board petitioned the Third Circuit for enforcement of its order. Amax intervened in the UMWA petition, and the UMWA intervened in the Amax petition. The cases were subsequently consolidated on appeal.

The case was argued before Circuit Judges Gibbons and Higginbotham and District Judge Ziegler of the United States District Court for the Western District of Pennsylvania. The decision of the Court, in which Judge Gibbons did not participate, appears in an opinion written by Judge Higginbotham and filed on February 1, 1980. That decision reverses, in part, the decision of the Board, by holding that the Trustees of the Funds are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA, and that the UMWA's insistence to impasse upon the Trustee Clause therefore violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA.

The UMWA, Amax and the Board each petitioned the Third

Circuit for rehearing *en banc*. The petitions were denied on May 29, 1980. The UMWA petition to the Supreme Court for a writ of certiorari followed. *Amicus curiae* supported the UMWA petition insofar as it requested the Supreme Court to review the Third Circuit's decision that the Trustees are collective bargaining representatives.

Subsequently, the Board petitioned the Supreme Court for review of the Third Circuit's decision limited to the question of whether the Trustees are collective bargaining representatives. The Board's petition was granted, and the UMWA petition was granted insofar as it related to the question of whether the Trustees are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA. The cases were consolidated for briefing and argument.

SUMMARY OF ARGUMENT

The decision of the Third Circuit that the Trustees of the Funds are collective bargaining representatives is contrary to the intent of Congress as expressed in Section 302(c)(5) of the LMRA and in ERISA.

The sole purpose of Section 302(c)(5) of the LMRA is to ensure that collectively bargained employee benefit funds are established and administered as legitimate trust funds, free from the labor-management politics inherent in collective bargaining. Indeed, the courts that subsequently construed Section 302(c)(5) invariably concluded that the trustees of funds established thereunder may not act solely in the interest of their appointing parties, as collective bargaining agents are required to do. Instead, the courts have consistently found that such trustees have an independent and overriding fiduciary duty to act solely in the interest of the beneficiaries of the trust funds they administer.

Consistent with the judicial decisions under Section 302(c)(5), ERISA requires trustees to act "solely in the interest of" the beneficiaries of the trusts they administer. 29 U.S.C. §1104(a)(1)(A)(i). Indeed, Section 406 of ERISA specifically prohibits trustees from acting in the interest of their appointing parties, as collective bargaining representatives are required to do. 29 U.S.C. §1106(b)(2).

The two-judge panel of the Third Circuit ignored these provisions, and misconstrued the judicial decisions which they affirm,

in erroneously deciding that trustees of funds established under Section 302(c)(5) are collective bargaining representatives of the parties who appoint them. If allowed to stand, this decision would have serious adverse consequences for the trustees of multiemployer trusts established under Section 302(c)(5). Indeed, the decision would subject trustees to inherently conflicting duties and liabilities and, therefore, preclude effective administration of the trusts. Moreover, the decision would threaten the continued existence of multiemployer trusts.

ARGUMENT

The trustees of multiemployer trusts established pursuant to Section 302(c)(5) of the LMRA do not function in the administration of those trusts as "representatives for the purposes of collective bargaining" within the meaning of Section 8(b)(1)(B) of the NLRA.

Section 302(c)(5) of the LMRA requires that employers and employees be equally represented "in the administration of" the trusts established thereunder. 29 U.S.C. §186(c)(5)(B). The Section refers to the trustees of such trusts as "representatives" of the employers and employees who appoint them. The Third Circuit construed the term "representatives" under Section 302(c)(5) to be "representatives for the purposes of collective bargaining" under Section 8(b)(1)(B) of the NLRA. Trustee representation of employers and employees "in the administration of" a Section 302(c)(5) trust is not, however, tantamount to representation "for purposes of collective bargaining" within the meaning of Section 8(b)(1)(B) of the NLRA. *See Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Company,* 404 U.S. 157, 170 (1971); *United States v. Ryan,* 350 U.S. 229, 305 (1956). This is readily apparent from the purpose of Section 302(c)(5) as revealed by the legislative history. *United States v. Ryan, supra,* 350 U.S. at 305.

The enactment of Section 302(c)(5) was precipitated by UMWA collective bargaining demands "for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials." *Arroyo v. United States,* 359 U.S. 419, 426 (1959); 93 Cong.Rec. 4678 (1947); *see also United States v. Ryan, supra,* 350 U.S. at 304-305. Congress was particularly

concerned with preventing the fund from becoming a union "war-chest," usable "for any purpose . . . to the advantage of the union." 93 Cong.Rec. 4746-47 (1947); *Arroyo v. United States, supra,* 359 U.S. at 426. Consistent therewith, Congress intended to ensure that employee welfare funds are established as "legitimate trust funds," used for "specified benefits to the employees of employers who contribute to them," and free from the abuses inherent in unilateral union administration. 93 Cong.Rec. 4678, 4746-47 (1947); *see also* 93 Cong.Rec. 3562-66, 3634 (1947); *United Marine Division I.L.A., Local 333, A.F. of L. v. Essex Transportation Co.,* 216 F.2d 410, 411-412 (3d Cir. 1954); *Blankenship v. Boyle,* 329 F.Supp. 1089, 1094-1095 (D.D.C. 1971), *aff'd mem.,* 511 F.2d 447 (D.C.Cir. 1975). Accordingly, Congress provided, in Section 302(c)(5), that payments to welfare funds would be permitted only if the payments were held in "trust fund[s]" for the "sole and exclusive benefit of the employees," and employers were equally represented "in the administration of" the trusts. *Id.*; 29 U.S.C. §186(c)(5).

It is obvious from the legislative history and the language of Section 302(c)(5) that Congress intended trust funds established thereunder to "be separate and apart from the union and employer creating the trust." *Lewis v. Seanor Coal Company,* 256 F.Supp. 456, 461 (W.D. Pa. 1966), *aff'd,* 382 F.2d 437 (3d Cir. 1967), *cert. denied,* 390 U.S. 947; *see United Marine Division, etc. v. Essex Transportation Co., supra,* 216 F.2d at 411-412. Indeed, Section 302(c)(5) was "designed expressly to isolate . . . welfare funds from labor management politics." *Blankenship v. Boyle, supra,* 329 F.Supp. 1094. Consistent therewith, Congress did not intend the trustees of Section 302(c)(5) trust funds to be collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA. Rather, Congress intended them to act as fiduciaries in the sole interest of the funds' beneficiaries. *Blankenship v. Boyle, supra,* 329 F.Supp. 1094; *see* 93 Cong.Rec. 4678 (1947).

Any doubt about this fact is resolved by the judicial decisions construing the term "representatives" in Section 302(c)(5) of the LMRA. Significantly, after considering the legislative history of Section 302(c)(5), the Third Circuit concluded in an earlier case that:

> These trustees [of a Section 302(c)(5) trust fund] were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half

> and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. [*United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412.]

Based upon that conclusion, the Court held that payment to the trustees of a Section 302(c)(5) welfare fund by an employer who was not a member of the employer association which appointed the management trustee was not an illegal payment to "any representative" of the employers' employees within the meaning of Section 302(a) of the LMRA. *Id.* at 413.

The District Court for the District of Columbia similarly construed Section 302(c)(5) in a case involving the Trustees of the UMWA Welfare and Retirement Fund of 1950 (" 1950 Fund"), the predecessor of the Funds. In *Blankenship v. Boyle, supra,* the Court rejected the argument that trustees, as "representatives" of labor and management, may act in the interest of their appointing parties and expressly found that:

> . . . there is nothing in the Labor-Management Relations Act or other federal statutes or in their legislative history which can be said to alleviate the otherwise strict common-law fiduciary responsibilities of trustees appointed for employee welfare or pension funds developed by collective bargaining.
> [*Blankenship v. Boyle, supra,* 329 F.Supp. at 1094. *Accord, United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412.][1]

Based on that rationale, the Court held that the Trustees of the 1950 Fund breached their fiduciary duty by failing to act in the exclusive interest of the beneficiaries of the Fund. *Id.* at 1094-95.

In *Miniard v. Lewis,* 387 F.2d 864 (D.C.Cir. 1967), *cert. denied,* 393 U.S. 873 (1968), another case involving the Trustees of the 1950 Fund, the District of Columbia Circuit rejected a claim of unfair representation against the UMWA Trustee on the basis that the

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[1] Well established common law principles require a trustee to "display throughout the administration of the trust complete loyalty to the interests of the beneficiary and [to] exclude all selfish interests and all consideration of the interests of third persons." Bogert, *Trusts and Trustees,* §543 (2d revised ed. 1978).

Trustee was not a collective bargaining representative. In rejecting the claim, the Court stated:

> Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employers or the union. [*Miniard v. Lewis, supra,* 387 F.2d at 865, n.5; *accord, United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412; *Morgan v. Laborers Pension Trust Fund,* 433 F.Supp. 518, 530 (N.D. Cal. 1977).]

Other courts have similarly delimited the scope of trustee representation under Section 302(c)(5) of the LMRA. As "representatives," trustees may consider and, in their discretion, adopt recommendations of the collective bargaining parties "pertinent to effective administration of the [f]und." *Toensing v. Brown,* 528 F.2d 69, 72 (9th Cir. 1975). Trustees may not, however, be bound by those recommendations. *Toensing v. Brown, supra,* 528 F.2d at 72; *Lamb v. Carey,* 498 F.2d 789, 794 (D.C.Cir. 1974), *cert. denied* 419 U.S. 869 (1974); *see Miniard v. Lewis, supra,* 387 F.2d at 865, n.5; *United Marine Division I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412. That is because trustees, as fiduciaries, are required to exercise independent judgment in administering trust funds established under Section 302(c)(5). They must act, in all instances, solely in the interest of the beneficiaries of the funds. *Id.* Indeed, they may not be removed except when they fail to do so. *Lamb v. Carey, supra,* 498 F.2d at 794.

Lamb v. Carey, supra, well illustrates the relationship between a trustee's representative and fiduciary capacities. In that case, the District of Columbia Circuit recognized that communication between a trustee and his appointing party is essential to informed decisions in the best interests of the trust beneficiaries. *Id.* at 793. The Court emphasized, however, that:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries.
> [*Lamb v. Carey, supra,* 498 F.2d at 793.]

Accordingly, although it affirmed a district court decision and order removing the UMWA Trustee of the 1950 Fund solely because

his intense political antagonism toward the UMWA management precluded him from representing the UMWA effectively, the Court stated that its decision "does not mean that the Court can remove a trustee whenever the Union expresses dissatisfaction." *Id.* at 794. Indeed, the Court adopted the statement of the district court, in its opinion and order dated February 15, 1973, that:

> The very nature of the Fund . . . is such that its integrity will be undermined if the Union is given the unilateral right to remove the Union Trustee whenever dissatisfaction or differences prompted by personality or political differences prompt the Union's management to seek a change.
> [*Id.* at 794.]

These decisions make it perfectly clear that the role of a trustee in the administration of a trust fund is "of a far different order" from that of a collective bargaining representative in contract negotiations. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co., supra,* 404 U.S. at 170. Indeed, it is obvious from the decisions that there is an "inherent conflict" between a trustee's fiduciary duties to trust beneficiaries and a collective bargaining representative's duty to his appointing party and the bargaining unit. *Nedd v. UMWA,* 556 F.2d 190, 204, 210 (3d Cir. 1977); *see Lamb v. Carey, supra,* 498 F.2d at 789; *Miniard v. Lewis, supra,* 387 F.2d at 864.

A collective bargaining representative is an advocate and an agent. *Morgan v. Laborers Pension Trust, supra,* 433 F.Supp. at 530. Such a representative must, "in conformity with the most basic principles of agency law, follow the instructions and act in the sole interest of his appointing authority." *Sheet Metal Workers International Association,* 234 N.L.R.B. 1238, 1247 (1978), *pet. for review pending,* (5th Cir. 1980) (No. 79-2396); *Local No. 2150, IBEW,* 192 N.L.R.B. 77, 78 (1971). A representative "in the administration of" a trust fund, however, is a fiduciary who must exercise independent judgment and act for "the sole and exclusive benefit" of trust beneficiaries. 29 U.S.C. §186(c)(5); *Lamb v. Carey, supra,* 498 F.2d at 794; *Toensing v. Brown, supra,* 528 F.2d at 72; *United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 411-412.

ERISA does not change the law under Section 302(c)(5). Rather, ERISA reaffirms the judicial decisions under Section 302(c)(5), and creates "numerous higher standards for the administration of" trust

funds established thereunder. *Cutaiar v. Marshall*, 590 F.2d 523, 530 (3d Cir. 1979); 29 U.S.C. §1001(b); *see* 126 Cong.Rec. S10104 (daily ed. July 29, 1980) (remarks of Senators Randolph and Williams); 126 Cong.Rec. H7902 (daily ed. August 26, 1980) (remarks of Rep. Thompson).

Consistent with the judicial decisions under Section 302(c)(5), it is the policy of ERISA, "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. §1001(b); *see Arroyo v. United States, supra*, 359 U.S. at 425-426; 93 Cong.Rec. 4678, 4746-4747 (1947). In Section 302(c)(5), however, Congress protects those interests by requiring that employee welfare funds be established as legitimate "trust fund[s]" for the "sole and exclusive benefit" of the beneficiaries and by providing for equal employer representation "in the administration of the [funds]." 29 U.S.C. §186(c)(5). In ERISA, on the other hand, Congress increases the protection by "establishing standards of conduct, responsibility and obligation for fiduciaries" who administer trust funds established in accordance with the requirements of Section 302(c)(5), "and by providing for appropriate remedies, sanctions, and ready access to the Federal courts" in the event of a breach of fiduciary duty. 29 U.S.C. §1001(b); *see* 29 U.S.C. §1001(a).

Under ERISA, a trustee is, by definition, a "fiduciary to the extent" he exercises "any discretionary authority . . . in the administration of such [trust]." 29 U.S.C. §1002(21)(A). And, significantly, ERISA requires a fiduciary to

> . . . discharge his duties . . .
> (a) (1) *solely* in the interest of the participants and beneficiaries and—
> (A) for the *exclusive purpose* of:
> (i) providing benefits to participants and their beneficiaries.
> [29 U.S.C. §1104(a)(1) (emphasis added).]

Consistent therewith, it is obvious that a trustee cannot act, as a collective bargaining representative must, "at the instructions and in the sole interest of" the party who appoints him. *See Sheet Metal Workers International Association, supra*, 234 N.L.R.B. at 1247. Any doubt about this fact is resolved by Section 406(b)(2) of ERISA, 29 U.S.C. §1106(b)(2), and its legislative history. Section 406 provides:

(b) A fiduciary with respect to a plan shall not—

. . .

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . . [29 U.S.C. §1106(b)(2).]

According to the joint explanatory statement of the Conference Committee, this prohibition

> prevents a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries. [Conference Report No. 93-1280, 93d Cong., 2d Sess. 309 (1974).]

It is abundantly clear, therefore, that ERISA prohibits a trustee from acting as a "representative" of his appointing party when he functions "in the administration of [the trust]." 29 U.S.C. §§1002(21)(A), 1104(a), 1106(b)(2); *see N.L.R.B. v. Construction and General Laborers' Union Local 1140*, 577 F.2d 16, 21 (8th Cir. 1978); *Morgan v. Laborers Pension Trust, supra*, 433 F.Supp. at 430.

Indeed, the courts that have considered ERISA's requirements have recognized that trustees and collective bargaining representatives function in separate and totally distinct capacities. *N.L.R.B. v. Construction and General Laborers' Union Local 1140, supra*, 577 F.2d at 21; *Morgan v. Laborers Pension Trust, supra*, 433 F.Supp at 430. And, to the extent that a trustee acts to "support the interests of [his appointing] party," he acts "beyond the scope of his authority as a trustee." *N.L.R.B. v. Construction and General Laborers' Union Local 1140, supra*, 577 F.2d at 21. A trustee is not an advocate, but a fiduciary. *Morgan v. Laborers Pension Trust, supra*, 433 F.Supp. at 430; *see Nedd v. UMWA, supra*, 556 F.2d at 209-210. As such, a trustee is required to comply with the fiduciary duties imposed by ERISA. *Id.* A trustee who breaches those fiduciary duties is subject to personal liability and removal by the court under Section 409 of ERISA. 29 U.S.C. §1109; *Marshall v. Snyder*, 572 F.2d 894 (2d Cir. 1978). Under Section 405 of ERISA, a trustee may also be liable for the breach of a co-trustee if he has knowledge of the breach. 29 U.S.C. §1105; *see Marshall v. Craft*, 463 F.Supp. 493, 497 (N.D. Ga. 1978).

The Third Circuit, however, ignored ERISA's requirements, and, contrary to authority, decided that trustees are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA. *Amax Coal Company v. N.L.R.B.*, 614 F.2d 872, 881-82 (3d Cir. 1980). If allowed to stand, that decision will adversely affect the very interests that Congress intended to protect: the "interests of participants in employee benefit plans and their beneficiaries." Section 2(b) of ERISA, 29 U.S.C. §1001(b); *see* 29 U.S.C. §1001(a).

Under the decision of the Third Circuit, for example, the UMWA could not bargain to impasse on the continued participation of 1786 independent employers in the Funds unless each employer were given the right to appoint a trustee. This could result in so many trustees that the Funds would become impossible to administer. It is more likely, however, that it would result in the discontinuation of the Funds and the establishment of single employer plans. This result would be detrimental to the participants because it would expose them to the higher costs and risks of single employer plans and deprive them of the portability offered by the Funds. *See Denver Metropolitan Association of Plumbing Contractors v. Plumbers Local No. 3*, 586 F.2d 1367, 1373-1375 (10th Cir. 1978); *Sheet Metal Workers International Association, supra*.

In enacting the Multiemployer Pension Plan Amendments Act of 1980, Pub.L.No. 96-364 (Sept. 30, 1980) (hereinafter the "Act"), Congress recognized the substantial interest of participants in the continued existence of multiemployer funds. Indeed, Congress specifically found that:

> (3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and
> (4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations. . . . [*Id.*, Section 3(a)(3), (4)(A).]

Accordingly, Congress declared it to be the policy of the Act "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans. . . ." *Id.*, Section 3(c)(2). It is readily apparent, therefore, that the decision of the

Third Circuit in this respect, as in all others, directly conflicts with Congressional intent.

Indeed, the legislative history of the Act reveals that it was the intent of Congress to reaffirm the present law, "that these plan trustees as fiduciaries have sole responsibility to the participants and beneficiaries of the plan." 126 Cong.Rec. H7902 (daily ed. August 26, 1980) (remarks of Rep. Thompson). Accordingly, Representative Thompson viewed the Third Circuit's decision as "an erroneous interpretation of both ERISA and federal labor law" that "does not reflect congressional intent." *Id.* Senators Randolph and Williams agreed that Congress had never intended that "an agency status should or does exist between trustees and their appointers." 126 Cong.Rec. S10104 (daily ed. July 29, 1980) (remarks of Senators Randolph and Williams).[2]

These recent statements, standing alone, may not be determinative of the Congressional intent in enacting Section 302(c)(5) of the LMRA and Sections 404 and 406 of ERISA. The statements are, however, wholly consistent with Section 302(c)(5) of the LMRA and ERISA, their legislative histories, and the judicial decisions thereunder. Indeed, it could not be more obvious that the decision of the Third Circuit conflicts with all authority.

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[2]Senator Williams was the Chairman of the Senate Committee on Labor and Human Resources and the floor manager of the Act. Senator Randolph was the second-ranking democrat on the Committee. Representative Thompson was the Chairman of the House Sub-committee on Labor Management Relations and the floor manager during House debates on the Act.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the Supreme Court should reverse the decision of the Third Circuit and remand the case with instructions to enforce the order of the Board.

Respectfully submitted,

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